

Development's Collateral Damage

The World Bank, involuntary resettlement and human rights

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Photo: A man and his dog sit amidst the ruins of what was once his house at Boeung Kak Lake in Cambodia. He was forcibly evicted in September 2011 to make way for an urban development in Phnom Penh.

Photo and information courtesy: Licadho, Cambodia.

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Abbreviations and Acronyms

BP	Bank Procedures
CESCR	Committee on Economic, Social and Cultural Rights
GP	Good Practice
HRC	Human Rights Committee
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDA	International Development Association
ILO	International Labour Organization
IMF	International Monetary Fund
NGO	Non Government Organisation
OP	Operational Policy
UN	United Nations
UNDR	Universal Declaration of Human Rights
WCD	World Commission on Dams
WWII	World War Two

1 Introduction

[M]ost large forced dislocations of people do not occur in conditions of armed conflict or genocide but in routine, everyday evictions to make way for development projects ... Indeed, this 'development cleansing' may well constitute ethnic cleansing in disguise, as the people dislocated so often turn out to be from minority ethnic and racial communities.

- Professor Balakrishnan Rajagopal¹

[I]mpoverishment and disempowerment have been the rule rather than the exception with respect to resettled people around the world.

- World Commission on Dams²

1.1 The development displacement dilemma

In the name of development, every year millions of people throughout the world lose their homes, their livelihoods, their communities. This, of course, is not the intended consequence. Development projects are generally embraced to promote human well-being – to provide inter alia better access to food, water, shelter and employment.³ In many parts of the world this is arguably essential just to help meet basic needs. However, for many of those living in the path of planned dams, power stations, mines, highways, logging operations and urban renewal schemes, somewhat ironically, these projects will more likely than not leave them impoverished, if not destitute, as the above citation indicates. A major study of displacement worldwide caused by infrastructure projects has found that most people living 'in the way' are forced from their homes and off their lands with no real choice in the matter, and in many cases accompanied by intimidation and violence.⁴ The study found relocation sites are often selected without regard to livelihood opportunities, with severe consequences for the displaced:

¹ Rajagopal (2001) A19.

² Bartolome (et al) (2000) 7 ('WCD Displacement Report').

³ De Wet (2009) 79.

⁴ WCD Displacement Report 12-14.

*For a vast majority of the indigenous/tribal peoples displaced by big projects the experience has been extremely negative in cultural, economic and health terms. The outcomes have included assetlessness, unemployment, debt-bondage, hunger, and cultural disintegration. For both indigenous and non-indigenous communities, studies show that displacement has disproportionately impacted on women and children.*⁵

Indigenous people are disproportionately represented among those forcibly displaced, sometimes the result of racist agendas, as the opening citation indicates.⁶ Other vulnerable groups are also disproportionately represented, but overall numbers of those affected each year are not really known. It has been estimated between 40 and 80 million people have been displaced globally by dam construction alone,⁷ while each year between 10 and 15 million people are believed to be displaced by development projects of various descriptions.⁸ However, the World Commission on Dams (WCD) found a “painful irony, and possible design, in the fact that there are no reliable official statistics of the number of people displaced”; where numbers are given “underestimation of the figures is the norm rather than the exception”.⁹ In a World Bank-funded project in Pakistan (*‘Pakistan Project’*), for example, the Bank’s Inspection Panel found more than 50 villages had been wrongly excluded from the list of those affected.¹⁰

The forcible displacement of people and communities is, arguably, one of the most controversial issues related to infrastructure projects, particularly in developing countries.¹¹ While losses for those displaced by ‘development’ can be as severe as for people forced to flee conflict,¹² the plight of the former is often viewed in very different terms. Backed by

⁵ Ibid 6.

⁶ See also Oliver-Smith (2009b) 143.

⁷ WCD Displacement Report 1.

⁸ See Oliver-Smith (2009a) 3; Robinson (2003) 3.

⁹ WCD Displacement Report 1.

¹⁰ Inspection Panel, *Pakistan – National Drainage Program Project Investigation Report* (2006) xx, xxviii (*‘Pakistan Report’*).

¹¹ Oliver Smith (2009a) 3.

¹² Robinson (2003) 1.

international norms that grant the state the right to take property in the ‘national interest,’¹³ officially their removal is deemed legitimate - a sacrifice by the few for the ‘greater good’ of the country.¹⁴ And yet, through this prism, in some developing countries the ‘few’ have not been recognised as people whose rights to land, resources and community are being stripped. The WCD found the displaced were often viewed as requiring “rehabilitation, not empowerment, for there is no recognition of their disenfranchisement”.¹⁵ Thus, while forcible acquisition of property is legally sanctioned, until recently many developing countries did not have comprehensive legal frameworks governing the process of displacement itself.¹⁶ Perhaps not surprisingly then, many reports have documented poorly-financed and implemented resettlements¹⁷ or cases where little or no provision has been made for the displaced.¹⁸

International community implicated

People forced to abandon their homes and livelihoods by development projects thus pose a serious challenge to the international human rights system. Even when a project is clearly justified in the public interest, if people are not adequately resettled and their earning capacity and communities restored then their rights are seriously violated.¹⁹ The international community itself has been implicated through institutions like the World Bank²⁰ (Bank) that has funded many of these “development disasters”.²¹ Indeed from its earliest days, the Bank – a public institution with a mandate of poverty alleviation, owned by its 187 member countries – has come under fire over its apparent disregard of human rights and other social impacts of its projects. The Bank’s role in involuntary resettlement in particular has been seen as critical given the sheer numbers of mostly poor people affected by Bank-funded

¹³ Ibid 4.

¹⁴ *WCD Displacement Report* 3; Penz (2002) 4-5.

¹⁵ *WCD Displacement Report* 3-4.

¹⁶ Roquet and Durocher (2006) 11.

¹⁷ See eg. Inspection Panel *India: Mumbai Urban Transport Project Investigation Report* (2005) (*‘Mumbai Report’*); Clark, Fox and Treake (2003); Cernea (2009) 50; *WCD Displacement Report*.

¹⁸ See eg. Johnston (2009) 201-224.

¹⁹ Pettersson (2002) 17.

²⁰ Created at the end of WWII, the World Bank is a financial institution with a mission to provide loans and credits to developing countries. It comprises two public lending arms - the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA); this is the meaning of the ‘Bank’ used in this thesis.

²¹ See eg. Johnston (2009) 201 -204.

projects, and what is seen as its “pivotal role in determining investments, institutional development and public policy in developing countries”.²²

The Bank did eventually respond to the critics and, indeed, its response was pioneering; in 1980 the Bank became the first development agency to adopt a comprehensive policy on involuntary resettlement.²³ This was one of a number of binding Bank policies that collectively became known as the ‘safeguard policies’.²⁵ The Involuntary Resettlement policy marked a significant change in the Bank’s approach to projects, with resettlement to be treated as an integral, rather than peripheral, feature of planning and execution.²⁶

Nonetheless, serious problems persisted and indeed the guidelines did little to increase accountability; local people still had no recourse even when their rights were trampled in violation of the policies. The Sardar Sarovar dam project in India – which involved the eviction of hundreds of thousands of people in the 1980s - was a case in point, but this time local and international opposition combined to pressure the Bank to agree to the first-ever independent review of one of its projects. The subsequent Morse Commission found the Bank had knowingly violated its safeguard policies and tolerated violations of loan covenants, resulting in serious harm for the displaced.²⁷ The Commission was something of a turning point - not only did it lead to the Bank’s withdrawal from the project, it led to irresistible pressure on the Bank for accountability mechanisms to respond to concerns of affected people.²⁸ The following year the Bank’s Board of Executive Directors authorised creation of an investigative body that was to have a certain degree of independence in examining public complaints. The Inspection Panel began operating in 1994 - an event hailed as a “remarkable advancement in international law”.²⁹

²² Treacle (undated).

²³ *Operational Manual Statement 2.33*.

²⁵ Clark (2008) 628.

²⁶ Rew, Fisher and Pandey (2000) 88.

²⁷ Morse and Berger (1992) (*‘Morse Commission’*).

²⁸ See Clark, Fox and Treacle (2003) 2-9.

²⁹ Hunter and Udall (1994).

1.2 Research questions

Significant as these developments have been, the question arises: just how well do the Bank's Involuntary Resettlement policy and accountability mechanism meet the requirements of international human rights law? Do they provide a solid foundation for ensuring people forced from their homes through 'development' are treated with dignity, in full respect of their human rights? Further, does the Bank's policy translate into field practice that meets international standards? This thesis, thus, sets out to examine the following questions:

- Is the World Bank's policy on involuntary resettlement consistent with international human rights law?
- Is the Inspection Panel process in line with international standards?
- Does the Bank's current field practice on involuntary resettlement accord with international human rights law?

The guidelines to be examined are *Operational Policy 4.12 - Involuntary Resettlement* (OP 4.12) that is backed up by *Bank Procedures 4.12*.³⁰ The Inspection Panel process is outlined in chapter four, while the parameters of 'current field practice' are discussed in the next section. A subsidiary question to this research is whether the Bank is *required* by international law to abide by human rights law. It's beyond the scope of this thesis to examine this question in depth, but it is an important initial consideration as there are potentially far-reaching implications for the Bank in this area if indeed compliance is legally required.

These research questions are important on a number of levels. Firstly, each year millions of people are affected by the Bank's policy and practice in relation to involuntary resettlement. An inventory in 1999 of Bank projects found 2.6 million people were affected by resettlement programmes.³¹ The figures are only likely to have increased with renewed Bank emphasis on loans for infrastructure projects.³² While protecting human rights related to development-forced resettlement is primarily a state duty, international financial institutions are also seen

³⁰ The Bank policy format comprises binding Operational Policies (OPs) and Bank Procedures (BPs) and advisory Good Practices (GPs). The Bank's Involuntary Resettlement policy has been revised numerous times since 1980; OP/BP 4.12 *Involuntary Resettlement* came into operation in December 2001.

³¹ Clark (2002) 212.

³² Fountain (2005).

as having responsibilities, as will be discussed below. Compounding this issue is the Bank's enormous influence in this field with its policy being used internationally as a model – by regional development banks, donors and some countries.³³

Secondly, despite having had a policy for decades, the Bank's involvement with involuntary resettlement generally has been problematic. Ten years ago one observer described it as a “well-documented failure”.³⁴ Is this still the case? Shining a human rights lens on the policy and recent field practice may provide some insight, while - within limits noted below – also provide a current review of both the Bank's practice in relation to involuntary resettlement, and trends in the Inspection Panel's jurisprudence in this area.

Thirdly, the Bank is part of the United Nations (UN) system, a primary goal of which is to promote human rights. The UN has laboriously devised a set of minimum standards for the respect of human dignity. It is only logical and reasonable these are the standards the Bank should follow. It is thus important to establish if its policy sets the bar at an internationally-acceptable level and its practice follows suit.

Finally, the question is critical for the Bank's credibility. In recent years, the Bank has recognised the importance of human rights for achieving its goal of sustainable development.³⁵ It thus makes demands on governments over transparency and accountability. It's therefore relevant to determine if the Bank practices what it preaches.

1.3 Method and sources

This study essentially involves applying a normative standard (international human rights law) to an empirical reality - the Bank's policy, complaints system and field practice. The normative standard – the law relevant to involuntary resettlement - is primarily established using traditional legal methods of interpretation of the main human rights treaties, declarations, General Comments of the treaty bodies, as well as soft law documents. The empirical reality was established primarily through analysis of primary and secondary sources, including Bank documents and Panel investigation reports. While the research

³³ Roquet and Durocher (2006) 11.

³⁴ Clark (2002) 206.

³⁵ World Bank (1998a).

questions are primarily normative, the study includes an institutional analysis from a human rights perspective, thus it also necessarily involves other disciplines such as political science.

Particular mention needs to be made regarding the method of establishing the Bank's '*current field practice*' involving involuntary resettlement. This was primarily established through the lens of the Inspection Panel; all its case reports from the past six years involving involuntary resettlement (listed in Annex A) were examined with the aim of identifying recurring themes. Focus was placed on these reports as the Panel's investigations are generally considered thorough and credible, and are the most comprehensive independent source of information available. The six-year period was chosen as this indicates more recent Bank practices in the field, keeping in mind many of the projects reported on by the Panel during this period date back some years before 2005. These reports were supplemented by other material including management reports, NGO reports and newspaper articles.

1.4 Limitations

This study has two key limitations. Firstly, its assessment of Bank '*field practice*' is limited to Inspection Panel cases. These cases cannot be said to necessarily reflect overall Bank practice as these are simply cases where complainants have had the skills and resources to file complaints – they could reflect the tip of the iceberg or *only* problem cases. Nevertheless, it's evident from the reports that the Panel investigations are thorough and it's contended the Panel's experience over 17 years does enable some insights into recurring issues, particularly when viewed in light of other Bank and external materials.

Secondly, this study covers considerable territory – examining the Bank's policy, complaint system, field practice and possible legal obligations. Each of these areas could have been examined in far more depth but the discussion is restricted by space limitations. Thus, for example, this paper aims in chapter three to provide a concise outline of the law relating to this area, rather than a comprehensive overview, and can only touch on implications of any legal obligations. Nevertheless it's hoped the analysis helps provide some insight into the Bank's conformity with human rights law relating to involuntary resettlement, and its acceptance, or otherwise, of any legal duties in this area.

1.5 Structure

The introductory chapter aims to provide the sociological context to this thesis, as well as the historical context to the Bank's policy and practice on involuntary resettlement. Chapter two provides an international legal context to the study by examining whether the Bank has binding human rights obligations. It also traces the evolution of the Bank's own view on the matter as a point of departure and context for its policy and practice. Chapters three, four and five are the core of this thesis, respectively analysing the Bank's policy, complaint system and field practice pertaining to involuntary resettlement in light of human rights law. Chapter six seeks to draw some overall conclusions and briefly touches on ramifications for the Bank given the legal context.

2 The reach of human rights law: is the Bank in or out?

The question of whether the World Bank has obligations under international human rights law is in some senses quite a remarkable one to be asking in 2011. It's more than 60 years since the Bank was founded. Human rights law, of course, has developed considerably since the *Universal Declaration of Human Rights (UDHR)* in 1948 but it's noteworthy that after so many decades of operations, the Bank's legal framework is still a matter of debate. Perhaps even more remarkable – or concerning - is the fact that it's not a question the Bank itself has appeared interested in addressing, despite (or perhaps because of) the potentially profound implications for its work. This chapter will analyse this question but, first, it will examine the Bank's perspective on this issue.

2.1 *The view from the Bank*

It is not easy to find a clear position by the Bank on its legal obligations in relation to international human rights law. This 'view from the Bank,' therefore, provides a snapshot of the Bank's evolving attitude to human rights issues generally. This, in itself, sheds some light on why the Bank appears reluctant to more directly address the question of its possible rights' obligations.

*[T]o some of our shareholders the very mention of the words human rights is inflammatory language. It's getting into areas of politics ... [instead] we talk the language of economics and development.*³⁶

This 2004 comment by former Bank President, James Wolfensohn, captures the cautious and somewhat ambiguous approach to human rights that has been reflected in more formal actions

³⁶ Wolfensohn (2005) 21.

and writings by the Bank on its legal position. From its early days, the Bank took the position that as a financial institution - barred by its charter from involvement in “political affairs” and required to consider only “economic” factors in decision-making - human rights had little relevance to its work, let alone being matters giving rise to legal obligations. In the 1960s, insisting on its apolitical character, the Bank defied successive UN General Assembly resolutions urging it to cease lending to Portugal and South Africa due to their respective colonial and apartheid policies.³⁷ The oft-cited political prohibition argument is based on Article IV section 10 of the Bank’s founding instrument - its *Articles of Agreement (Articles)* - which state:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or the members concerned. Only economic considerations shall be relevant to their decisions...

This is reinforced by Article III, section 5(b). The Bank’s purpose as set out in Article 1 essentially is to promote development in member countries. The terms “political”, “economic” and “development” are not defined in the *Articles* and this inter alia has enabled the Bank considerable flexibility in interpreting its charter.³⁸

Before looking more closely at how the Bank has interpreted its mandate, it’s worth briefly considering the evolution in Bank activities that drew ever more controversy to the Bank over human rights. When its original ‘economic growth’ model struggled in the 1950s and ’60s to successfully address the problems of the poor, the Bank turned to a more direct focus on poverty alleviation, with programming including policy lending and governance reforms.³⁹ These activities had obvious rights dimensions and concerns were soon raised about the

³⁷ See Bleicher (1970).

³⁸ Bradlow (1996) 55-56.

³⁹ Ibid; see also Shihata (1991) 111-112.

rights' impacts⁴⁰ – and Bank accountability for such. Meanwhile, more traditional projects such as dam building had been raising concerns of their own.⁴¹

In 1990 the Bank's Legal Counsel, Ibrahim Shihata, provided some clarity on the Bank's position in a legal opinion which included a key statement on human rights.⁴² This was followed in 1995 by a legal memorandum⁴³ that expanded on the earlier opinion. In essence, the Shihata opinions, and his other writings,⁴⁴ offered a conservative interpretation of the Bank's mandate to confront the human rights' dimensions of its work. First, he took pains to emphasise the Bank's "impressive" record in promoting social and economic rights by inter alia "combating disease, malnutrition, illiteracy".⁴⁵ This, however, was not expressed in any terms implying a legal obligation to do so. 'Civil and political' rights were seen through another prism; generally these rights were not seen as a legitimate area of consideration for the Bank unless they had a "direct and obvious" impact on relevant economic matters. Thus, 'political' human rights could be taken into account "if they are so pervasive and repugnant to the point of clearly affecting the country's investment climate and economic performance".⁴⁷ Exceptions were also acknowledged for Security Council resolutions (arising from the Bank's agreement with the UN) and where the Bank required participation of affected people in the design and implementation of projects.

Clearly, defining the boundaries of permissible human rights considerations under these guidelines was not a science and their restrictive nature and ambiguity were widely criticised.⁴⁹ Crucially, too, the opinions studiously avoided the question of Bank responsibility for harms resulting from its projects. The legal opinions, and the Wolfensohn quote above, point to a strong resistance within the Bank culture at the time to view human

⁴⁰ See Bradlow (1996) 58-59.

⁴¹ See eg. *Morse Commission*.

⁴² Shihata (1990).

⁴³ Shihata (1995).

⁴⁴ See eg. Shihata (1991).

⁴⁵ Ibid 133.

⁴⁷ Shihata (1995) 234-235.

⁴⁹ See Horta (2002) 227-243; Bradlow (1996) 61-62; Broding (2001).

rights as international legal entitlements; rather, as one commentator put it, they were seen as “mired in ideology and selectivity”.⁵⁰

Nonetheless, the Bank’s approach to human rights has evolved considerably during the past 15 years. Not only has there been greater willingness to “mention the ‘R’ word which is ‘rights’”,⁵¹ broader concepts of development, with human rights at their core, have been embraced. In 1998 the Bank released a major report acknowledging that “creating the conditions for the attainment of human rights is a central and irreducible goal of development”.⁵² In 2006 the Bank’s then Legal Counsel, Roberto Danino, issued his own legal opinion, stressing the importance of human rights for “helping the Bank achieve its mission”.⁵³ Indeed, the manner in which the Bank’s mission was now understood made “consideration of human rights essential”.⁵⁴

The opinion, though, continued to narrowly confine the relevance of human rights to the Bank. It stressed that the Bank *may* assist member countries fulfill their human rights obligations, and *should* take human rights into account where violations had an economic impact. Rights were also relevant where policies required public participation. But the opinion stressed the Bank’s role was “not that of an enforcer of human rights obligations Rather the Bank’s role remains one of supportive cooperation with its members in the realisation of human rights”.⁵⁵ Thus, the Bank had a responsibility to stay engaged unless where “violations of human rights reach pervasive proportions, the Bank . . . can no longer achieve its purposes”.⁵⁶ Notably, again, the opinion did not seek to analyse whether the Bank itself may have human rights obligations to the poor it seeks to deliver from poverty. In this regard it was no more progressive than its predecessors.

⁵⁰ Clapham (2006) 139.

⁵¹ Wolfensohn (2005) 22.

⁵² World Bank (1998a) 2 .

⁵³ Danino (2006) 3 (‘*Danino Opinion*’).

⁵⁴ Ibid 4.

⁵⁵ Ibid 8.

⁵⁶ Ibid.

Danino's successor, Ana Palacio, has also adopted a similar approach – supporting the idea of further incorporating human rights into the Bank's work, but stressing this was not out of any legal obligation: "[The *Danino Opinion*] is 'permissive', allowing, but not mandating, action on the part of the Bank in relation to human rights."⁵⁷ The next section will begin to explore whether this 'view from the Bank' is legally justified.

2.2. Does the Bank have 'personality'?

The question arises - is the Bank's most recent approach to human rights issues legally sound? Is it correct to say while the Bank may be *permitted* to consider all human rights if relevant to its lending decisions, and *should* help countries which request assistance in meeting their rights' obligations, the Bank itself is not subject to mandatory obligations?

The inquiry into this issue first needs to establish whether the Bank has an international legal personality capable of being a holder of rights and duties under international law.⁵⁸

Traditionally, only States were seen as subjects of international law, that is possessors of 'international legal personality'. The International Court of Justice (ICJ) has indicated, however, that other entities may possess this status if they are capable of operating independent of their members.⁶⁰ The Bank was created by states through the entry into force of its *Articles of Agreement* as a treaty in accordance with international law.⁶¹ The *Articles* do not explicitly confer international legal personality. Case law indicates, therefore, the necessity to look to the powers and functions of the institution and other evidence of a "capacity to operate on an international plane".⁶² In the Bank's case, its capacity to enter into agreements governed by international law, the immunities and privileges provided under the *Articles*,⁶³ provisions in the *Articles* regarding its relationship with other international

⁵⁷ Palacio (2006) 2.

⁵⁸ Janis (1993) 176.

⁶⁰ *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179 ('*Reparations Case*').

⁶¹ Skogly (2003) 46.

⁶² *Reparations Case* 179.

⁶³ See *IBRD Articles of Agreement*, Section 3, Art. VII; see also *Reparations Case* 179.

organisations⁶⁴ and provisions evidencing an entity that operates separate from its members⁶⁵ indicate it does have international legal personality.⁶⁶

This means the Bank is bound by international law. As the ICJ has stated, an international organisation, as a subject of international law, is “bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”.⁶⁷ The Bank, thus, is required to carry out its mandate in full compliance with international law, including international human rights law.⁶⁸ Indeed, the Bank has explicitly acknowledged this in its own environmental assessment ‘Sourcebook’: “The World Bank, an organization created and governed by public international law, undertakes its operations in compliance with applicable public international law principles and rules.”⁶⁹

2.3 Bank as a Specialised Agency

The Bank is a specialised agency of the UN by virtue of a relationship agreement⁷⁰ entered into in accordance with Articles 57 and 63 of the *UN Charter*. Does this give rise to obligations to respect the fundamental purposes of the UN as they pertain to human rights?⁷¹

The *Relationship Agreement* does grant the Bank significant independence. In part, Article 1(2) states: “By reason of the nature of its international responsibilities, the Bank is, and is required to function as, an independent organization.” However, as Darrow points out there are “degrees of independence”, and the agreement sets out areas of co-operation as well as express provisions requiring the Bank to abide by Security Council resolutions.⁷² Skogly

⁶⁴ Art. V, s.8.

⁶⁵ See eg. Art VII, s.2.

⁶⁶ See Skogly (2001) 63-68.

⁶⁷ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, 89-90.

⁶⁸ Skogly (2003) 47.

⁶⁹ World Bank (1996) 63 cited in Darrow (2003) 126-127.

⁷⁰ *Agreement between the United Nations and the International Bank for Reconstruction and Development*, 15 November 1948 (*‘Relationship Agreement’*).

⁷¹ See *UN Charter* Arts 1, 55 and 56.

⁷² Darrow (2003) 124-125.

argues it's logical part of the purpose in forging formalised relationships between the specialised agencies and the UN must have been to grant them both rights and obligations in relation to the UN, with a minimum level of obligation not to contravene the principles and purposes of the *UN Charter*.⁷³ Therefore, the Bank's 'independence' is from interference by the UN, not from international law as represented in the *UN Charter*. Thus, its independent status should not be interpreted to alleviate the obligation of the Bank to observe the principles and purposes of the UN pertaining to human rights.⁷⁴

2.4 Obligations arising from members' duties

A further possible source of obligation for the Bank arises from responsibilities of member governments which have taken on human rights obligations by ratifying the *UN Charter* and other rights treaties. In regard to members' obligations arising from the *UN Charter* (under Articles 1(3), 55 and 56),⁷⁵ these will take precedence over other duties under international law by virtue of Article 103 of the Charter.

Although the Charter obligations are general, it's been argued the *UDHR* gives an authoritative interpretation of the Charter-based obligations⁷⁶ (see further discussion below). Debtor states will be required to carry out their development programmes in a manner that respects and promotes their peoples' rights in line with their treaty obligations. For the Bank it means, at the least, it should not act in a manner that would facilitate a breach of those obligations.⁷⁷ Indeed, the Bank in its environmental policy undertakes not to operate in a manner that would breach a member's environmental treaty obligations;⁷⁸ the same principle is clearly appropriate for human rights obligations that are no less binding than environmental treaties.⁷⁹

⁷³ Skogly (2001) 100-101.

⁷⁴ Ibid 105.

⁷⁵ The ICJ has held these provisions create legal obligations on members to respect human rights: *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 [129]-[131].

⁷⁶ See Brownlie (2008) 559; Buergenthal (1999) 96; Simma and Alston (1989) 100-1.

⁷⁷ Skogly (2003) 49.

⁷⁸ *OP 4.01 - Environmental Assessment* [3].

⁷⁹ De Feyter (2003) 101.

2.5 *Implications of obligations*

So what does all this mean for the Bank? If it does have human rights obligations, what is the scope of these obligations? International human rights obligations arise under treaty law, customary international law and general principles of law.⁸⁰ In regards to treaty law, as noted, obligations arising out of the *UN Charter* will be relevant and provisions in treaties that embody customary law or general principles of international law will also be important.⁸¹

As a subject of international law, customary law and general principles of international law will be directly relevant and binding on the Bank. But what are these norms the Bank is bound to honour? There is considerable debate as to the customary nature of human rights law. A number of parties have treated as customary the *UDHR*,⁸² among them the European Union,⁸³ while others contend only parts of the *UDHR* could be considered customary.⁸⁴ Suffice to say there is little consensus. Skogly argues plausibly, however, almost all rights in the *UDHR* have a “customary core” and, at the least, the Bank would be required respect this “core”.⁸⁵

A similar outcome stems from analysing duties arising under ‘general principles’ deriving from national or international systems. General principles can be considered broader than customary law as they can also reflect situations where “a norm invented with strong inherent authority is widely accepted even though widely violated”.⁸⁶ In this sense, it’s been argued the *UDHR* could more usefully be considered an expression of general principles of international law given the numerous references in, for example, UN documents, national constitutions and legislation.⁸⁷

⁸⁰ *Statute of the International Court of Justice*, Art 38.

⁸¹ See Buergenthal (1999) who suggests (at 96) the entire International Bill of Human Rights is relevant in this regard; Schermers and Blokker (1995) 984-89.

⁸² Buergenthal (1999) 96; Sohn (1982) 16-17.

⁸³ Rosas (1999) 206.

⁸⁴ See eg. Brownlie (2008) 559.

⁸⁵ Skogly (2001) 123.

⁸⁶ Simma and Alston (1989) 102.

⁸⁷ Brownlie (2008) 559; Skogly (2001) 124.

So what would this status of the *UDHR* as either customary law or general principles of law mean for the Bank? This is a complex question that can only be touched on in this paper. There are a number of possible approaches. In brief, one approach is through the concept of ‘due diligence’ applying to subjects of international law. This approach sees the Bank, as a subject of international law, under a positive obligation of vigilance in regard to activities under its control.⁸⁸ This would require it to take positive action to ensure it avoids directly violating any human rights and avoids complicity in violations by another.⁸⁹ In this regard it’s relevant to note the approach to “human rights due diligence” articulated in a new set of (non-binding) UN Guiding Principles for business.⁹⁰ Another approach is through the classification of rights obligations in terms of duties to ‘respect’, ‘protect’ and ‘fulfill’.⁹¹

The duty to ‘respect’ is reflected the *UN Charter* and also arises from ‘general principles’. It requires non-interference in the enjoyment of the right, but also involves a positive duty to prevent abuses.⁹² For the Bank it would mean ensuring its projects do not infringe basic rights of affected peoples or lead to loss of enjoyment of rights. Skogly gives an example of the duty on the Bank to respect the right to education in the context of a Bank-funded project involving forced resettlement. The primary obligation for the right to education would lie with the government, but the Bank would be under an obligation to ensure plans for the resettlement adequately provided for schooling at a standard, and to a timetable, that did not infringe the rights of the affected children.⁹³ Thus, this would require a thorough assessment of standards before the move, follow-up monitoring to ensure plans were implemented, and follow-up with the government if, indeed, the plans did not achieve the same level of education as previously existed. For any resettlement project, therefore, a comprehensive analysis of *all* rights likely to be affected would need to be carried out at the earliest stages, including rights to housing, education, health and adequate standard of living. This analysis would need to be incorporated into the plans; further assessments would be required during implementation and after completion of the project.⁹⁴

⁸⁸ Clapham (2005) 151 citing Klein (1999) 112.

⁸⁹ Ibid 151.

⁹⁰ See *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* [17]-[24] (*‘Ruggie Guidelines’*); endorsed by the Human Rights Council 16 June 2011.

⁹¹ See Eide (1987).

⁹² Darrow (2003) 132; see also *Ruggie Guidelines* [11]-[24] on “responsibility to respect”.

⁹³ Skogly (2001) 124.

⁹⁴ Skogly (2003) 59-64.

The obligation to ‘protect’ refers to positive action to prevent a third party under the control of the duty holder from violating rights. This could be relevant for the Bank in dealing with contractors, and where people come under threat after participating in consultations regarding projects,⁹⁵ or when they seek to use the Bank’s complaint mechanism. The latter has been an issue in a number of cases discussed below. It could also be argued the Bank has protective duties to ensure the borrower does not violate the rights of affected people as it exercises certain control over how rights are protected in terms of determining contractual obligations. That is, it has a protective duty to ensure it is not complicit in abuses. The obligation to ‘fulfill’ requires steps to be taken to ensure rights can be realized. Normally, this is a state responsibility, but there may be circumstances where this would be relevant to the Bank where obligations arise from general principles or custom,⁹⁶ particularly in regard to procedural rights.⁹⁷

2.6 Conclusion on obligations

The above discussion indicates the Bank does, indeed, have international human rights obligations arising from its legal personality, its status as a specialised UN agency and an organisation comprising members with obligations. Generally, the obligations will be grounded in customary and general principles of law. They arguably involve duties of due diligence and to respect, protect and, in some circumstances, fulfill rights. It would appear these obligations have been acknowledged in internal Bank material, as noted, but not publicly by the legal department which has shied away from seriously examining this question. The latter may be seen as self-serving as such obligations give rise to duties on the Bank to take steps to meet these obligations. It’s beyond the scope, and not the aim, of this thesis to discuss in depth the implications for the Bank of such a conclusion. Rather this discussion provides a context for the main research questions; if the Bank, as contended, does have binding obligations, the imperative to ensure its policy and practice is in line with international law is not just a matter of ‘good international citizenship’, rather it’s a matter of *legal duty*.

⁹⁵ Darrow (2003) 132.

⁹⁶ Skogly (2003) 57.

⁹⁷ Darrow (2003) 132-133.

If my conclusion on the Bank's duties in relation to human rights is not correct, it suggests a major gap exists in the international human rights protection system. Regardless however, the following discussion would still be important in terms of accountability for an organisation which, for better or for worse, each year affects the lives of millions. It would, indeed, be ironic if the Bank - that for some time now has stressed the importance of transparency, accountability and the rule of law for the countries in which it operates - was not under binding obligations to observe human rights law and account for the impacts of its own work. Indeed, the UN Committee on Economic, Social and Cultural Rights (CESCR), clearly believes the Bank has a responsibility – moral, if not legal - to abide by international human rights:

*International agencies should scrupulously avoid involvement in projects which, for example ... reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation ... Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account.*⁹⁸

Even in the absence of legal obligation, therefore, it can be argued it's crucial the Bank actively observes the requirements of international human rights law for a range of normative and moral reasons,⁹⁹ as well as its own credibility. As the Legal Counsel for the International Monetary Fund has stated: "If the international organisations are to be successful in this [developing sound frameworks for governance] task, they must be credible. To be credible, they must apply the rule of law to their own situation, just as they encourage others to apply it to theirs".¹⁰⁰ In order to assess if the Bank is meeting the required international standards (whether it is legally obliged to or not) the next chapter will outline international human rights law as it relates to involuntary resettlement.

⁹⁸ CESCR *General Comment No. 2: International Technical Measures* (1990) [6], [8(d)] ('Comment 2').

⁹⁹ Some noted in s.1.2 above; see also Oloko-Onyango and Udgama (1999) [29]-[30].

¹⁰⁰ Gianviti (2001) [60].

3 The Involuntary Resettlement policy and human rights

3.1 Operational Policy 4.12

The World Bank frankly acknowledges the real risk of impoverishment for people displaced by projects it funds. Its Operational Policy 4.12 on Involuntary Resettlement opens with the following statement: “Bank experience indicates that involuntary resettlement under development projects, if unmitigated, often gives rise to severe economic, social and environmental risks.”

The explicit aim of OP 4.12 is to “address and mitigate” the risk of impoverishing affected people. This means:¹⁰¹

- avoiding, if feasible, or otherwise minimising involuntary resettlement by exploring all viable project designs;
- designing resettlement as a sustainable development project to ensure displaced persons benefit from the project and are meaningfully consulted;
- assisting displaced persons improve their livelihoods and standard of living or “at least restore them, in real terms”.

The policy requires compensation at full replacement cost for lost assets, choices of relocation sites, information on rights and options, community participation in planning and implementing any resettlement, replacement housing or land at a standard at least equivalent to the old site, relocation assistance, support to restore livelihoods, as well as development assistance such as training or job opportunities. The policy also calls for particular attention to be paid to the needs of vulnerable groups including women, children, landless people and ethnic minorities. It emphasises the particular complexities related to indigenous people and includes special provisions to apply when they are potentially affected.¹⁰²

¹⁰¹ OP 4.12 [2].

¹⁰² Ibid [9]. A number of other Bank policies are relevant to resettlement, including *OP 4.10 - Indigenous People*, *OP 13.05-Project Supervision* and *OP 4.01 - Environmental Assessment*.

Under the policy “displaced persons” are defined as persons “affected in any of the ways” described in paragraph 3 which covers “direct economic and social impacts” resulting from Bank-assisted investment projects and caused by the involuntary taking of land. The impacts covered include relocation or loss of shelter, loss of assets or access to assets and loss of income sources or means of livelihood. The “involuntary” nature of the resettlement immediately suggests an element of coercion. The policy defines “involuntary” as actions that may be taken without the displaced persons informed consent or power of choice.¹⁰³

The former Representative of the UN Secretary-General on Internally Displaced People, Francis Deng, has described the Bank’s guidelines as an “important step in formulating requirements for projects that might lead to displacement”.¹⁰⁴ But do these guidelines – that are meant to be binding on Bank staff and borrowers – accord with international human rights standards? Do they lay a foundation to ensure the rights of people displaced by development projects are fully respected? Before tackling these questions, it’s important to consider what protections are provided by international human rights law for people who may find themselves in the path of development. Among other issues, can they legally be evicted against their will for development purposes?

3.2 Human rights law and involuntary resettlement

There is as yet no legally binding international treaty that provides specific and comprehensive rights to people whose lives and livelihoods are threatened by development projects.¹⁰⁵ There are, however, a range of rights recognised in the International Bill of Human Rights¹⁰⁶ relevant to involuntary resettlement. While the *UDHR* is a non-binding instrument, as discussed above the rights contained in it arguably can be considered to have a “customary core” that will be binding on all states and other international legal subjects. The two international covenants, on the other hand, have been widely ratified and are binding on the state parties - the *International Covenant on Economic, Social and Cultural Rights*

¹⁰³ OP 4.12 fn 7.

¹⁰⁴ Deng (1998) 5.

¹⁰⁵ Barutciski (2006) 75.

¹⁰⁶ See *The Limburg Principles on the Implementation of the International Covenant on Economic and Social Rights* E/C.12/2000/13 [3] (*‘Limburg Principles’*); These principles were prepared in 1986 to reflect international law (with some exceptions) by a group of “distinguished experts”.

(ICESCR) has 160 state parties, while the *International Covenant on Civil and Political Rights (ICCPR)* has 164. In the following outline of the law in this area, considerable reference is made to the General Comments of the Covenants' treaty bodies. These interpretations do not carry the force of law but are considered authoritative.¹⁰⁷ The ICJ¹⁰⁸ and other adjudicators have favourably referenced the treaty bodies' interpretations, including specific reference to *General Comment No. 7* on forced evictions,¹⁰⁹ discussed below. The principles articulated in *Comment No. 7* have also been applied in numerous cases in Europe and Africa, particularly by South Africa's Constitutional Court.¹¹⁰ Given space limitations this case law will not be explored here: suffice to say significant jurisprudence reinforcing rights relating to forced evictions, discussed below, has been developed by both courts and the treaty bodies themselves in their supervisory role.¹¹¹

3.2.1 Economic and social rights

One of the most relevant provisions relating to forced evictions is contained in the *ICESCR* which recognises the right to adequate housing in Article 11(1). The Covenant's treaty body, the CESCR, has stated this incorporates the right to live in "security, peace and dignity,"¹¹² with all persons entitled to a "degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats".¹¹³ It also incorporates the right not to be subjected to arbitrary or unlawful interference with one's privacy, family or home.¹¹⁴ In its *General Comment 4*, the CESCR concluded that

... forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant provisions of international law.¹¹⁵

¹⁰⁷ See Blake (2008) 38.

¹⁰⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 36 [136].

¹⁰⁹ See eg. *SERAC v Nigeria* Communication 155/96 [63].

¹¹⁰ See eg. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

¹¹¹ For overview see Langford and du Plessis (2006) 14-15.

¹¹² CESCR, *General Comment No. 4: Right to Adequate Housing* (Art. 11.1) (1991) [7] ('Comment 4').

¹¹³ *Ibid* [8(a)].

¹¹⁴ *Ibid* [9].

¹¹⁵ *Ibid* [18].

The CESCR, however, did not define what it meant by “forced evictions” until 1997 when it revisited the right to housing. Following what it said were numerous reports of forced evictions in violation of the Covenant, the Committee issued *General Comment No. 7*¹¹⁶ specifically examining this problem. It noted that while the term “forced evictions” was somewhat problematic, it sought to convey a sense of arbitrariness and illegality. It defined the term as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”.¹¹⁷ Thus, the most crucial issue was not removal without consent, rather it was the absence of appropriate legal and other protections for affected people. The CESCR emphasised evictions without these protections in place were prohibited under the human rights Covenants. It noted legislation that provided security of tenure to occupiers of houses and land, and was designed to strictly control the circumstances under which evictions may be carried out, including penalties for private or public parties in breach, was initial evidence a state provided the necessary level of protection against arbitrary evictions.¹¹⁸

Some evictions, therefore, would be lawful. The Committee noted there could be situations where it would be reasonable to impose limits on the right to housing. But in such situations the conditions set down in Article 4 of the *ICESCR* had to be met – that is, firstly, the limitation must be “determined by law” and be compatible with the nature of the rights; and, secondly, it must be “solely for the purpose of promoting the general welfare in a democratic society”.¹¹⁹ Thus, this requires a legitimate legal system, the decision regarding displacement is taken by an authority empowered by law to do so, and the decision is solely motivated by the public benefit, objectively determined.¹²⁰ Further, the wording “in a democratic society” in Article 4 suggests limits on such rights can only be justified in countries where citizens enjoy rights of free expression and participation, with corresponding access to forums to be able to defend their rights.¹²¹ Thus, it follows evictions carried out by force would be prohibited under the *ICESCR* in states where those affected do not enjoy such rights and protections.

¹¹⁶ CESCR, *General Comment No. 7: Right to Adequate Housing* (Art. 11.1) (1997) [1] (*‘Comment 7’*).

¹¹⁷ *Ibid* [3].

¹¹⁸ *Ibid* [9].

¹¹⁹ See Alston and Quinn (1987) 201-205; *Limburg Principles* [46]-[55].

¹²⁰ *Ibid* (1987) 202.

¹²¹ *Ibid* 203.

If eviction can be justified in “exceptional circumstances” for the public benefit, the Committee requires the following safeguards in place:¹²²

- protective legislation, referred to above;
- any law authorising evictions must be “reasonable in the circumstances,” in line with principles of reasonableness and proportionality;
- all feasible alternatives to eviction explored in genuine consultation with affected persons, with a view to avoiding or at least minimising the need for force;
- legal remedies;
- adequate compensation for any affected property (real or personal);
- opportunities for genuine consultation;
- timely information and reasonable notice prior to eviction;
- government representatives to be present during eviction;
- provision of legal aid, where possible, for persons wanting redress from Courts;
- mechanisms to guard against discrimination.¹²³

These rights protected under *ICESCR* are also backed up by a range of provisions in the *UDHR* protecting the right to adequate housing, property, and non-interference with home life, among others.¹²⁴ Further, legal protections to guard against displacement are available for indigenous people under the ILO’s *Convention No. 169*.¹²⁵ Protections under these instruments have also been reinforced in resolutions by the UN’s Commission on Human Rights in 1993 and 2004, the former describing forced evictions as a “gross violation of human rights”.¹²⁶

3.2.2 Civil and political rights

A range of civil and political rights are also relevant to forced eviction. Article 17 of the *ICCPR* complements the right not to be displaced without adequate protection, noted above, recognising the right to be protected against “arbitrary or unlawful” interference with a

¹²² See *Comment 7* [10], [13], [14] & [15].

¹²³ This latter point is mandated by the anti-discrimination clauses of the *ICESCR* (Art 2(2) & 3), *ICCPR* (Art 2), *UDHR* (Art 2 & 7).

¹²⁴ *UDHR* Art 12, 17(2), 25 & 29(2).

¹²⁵ See eg. *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 1989 Art 7 & 16 (‘*Convention 169*’).

¹²⁶ Resolution 1993/77; Resolution 2004/28.

person's privacy, family or home. This provision specifically requires a state to have laws to protect against such interference¹²⁷ and any intervention must be "reasonable in the particular circumstances".¹²⁸ This is also provided for in the *UDHR* in Article 12. The *ICCPR*'s supervisory body, the Human Rights Committee (HRC), in this regard specifically called on Kenya to develop transparent policies on evictions in Concluding Observations in 2005.¹²⁹

Article 12 of the *ICCPR* protects the right to liberty of movement and freedom to choose one's residence.¹³⁰ Restrictions are only permitted to this right where they are specifically "provided by law, [and] necessary to protect national security or public order ... or the rights and freedoms of others..."¹³¹ The HRC has noted any restriction must be the least intrusive possible, and be proportionate to the interest protected.¹³² Thus, in the context of development projects, this right implies a rigorous assessment of the *necessity* of any development project involving forced eviction. Indeed, as was stated in 1993 by the World Conference on Human Rights:

*While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognised human rights.*¹³³

The *ICCPR* also provides protections in relation to the right to life (Article 6) and security of the person (Article 9) – rights often violated by security forces or private armed guards taking action to move people forcibly or quell dissent.¹³⁴ The *UDHR* also covers these issues.¹³⁵ Both these rights prohibit "arbitrary" actions that would threaten life or lead to arrest or detention. In case of the latter, it must be open to the detained person to contest the lawfulness of the action in a court.¹³⁶ Thus again, an effective system of law is critical.

¹²⁷ Art 17 (2).

¹²⁸ Human Rights Committee, *General Comment No. 16: Right to Privacy* (Art 17)(1988) [4].

¹²⁹ CCPR/CO/83/KEN.

¹³⁰ See also *UDHR* Art 13(1).

¹³¹ *ICCPR* Art 12(3).

¹³² HRC, *General Comment No. 27: Freedom of Movement* (Art 12)(1999) [14].

¹³³ *Vienna Declaration and Programme of Action*, 1993 [10].

¹³⁴ Hoshour and Kalafut (2007) 4.

¹³⁵ Art 3 & 9.

¹³⁶ *ICCPR* Art 9(4).

Remedies are also important for people affected by projects. A right to an “effective remedy” is provided for in Article 2(3) of the *ICCPR*. It ensures any person whose rights are violated under the Covenant shall have access to a competent domestic authority, if possible judicial, to determine the case and enforce remedies. The *UDHR* (Article 8) also protects this right more generally. Further, a set of (non-binding) Basic Principles adopted by the General Assembly also emphasise the right to a remedy for victims of gross human rights violations, including effective access to justice and prompt reparations.¹³⁷

3.2.3 Minimum safeguards generally

More generally, a number of soft law mechanisms exist to promote good practices related to displacement. These include the *Guiding Principles on Internal Displacement* which “are consistent with international human rights and humanitarian law,”¹³⁸ suggesting they could in part reflect customary and/or general law principles, particularly given their extensive use.¹³⁹ These principles state that the prohibition against arbitrary displacement includes large-scale development projects which are “not justified by compelling and overriding public interests”;¹⁴⁰ thus setting a test for assessing the legality of forced evictions. They also stress the requirement for authorities to explore “all feasible alternatives”. Where no alternatives exist, “all measures shall be taken to minimise displacement and its adverse affects”. The free and informed consent of those to be displaced must be sought (though this does not appear to require consent is given); full information provided on reasons, procedures, relocation sites and compensation; and efforts must be made to involve those affected, particularly women, in the planning and management of their relocation. Affected people must also have the right to an effective remedy, including review of such decisions by judicial authorities.¹⁴²

¹³⁷ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2006) [11].

¹³⁸ See: Introductory Note, *Guiding Principles on Internal Displacement* (‘*Internal Displacement*’); these guidelines were drafted by the (then) Secretary-General’s Representative on Internally Displaced Persons, Francis Deng, and presented to the Commission on Human Rights in 1998.

¹³⁹ See Hyll-Larsen (2010) 6-8.

¹⁴⁰ *Internal Displacement*, Principle 6(2)(c).

¹⁴² *Ibid*, Principle 7.

In short, international human rights law provides a range of rights and protections for people facing development-related displacement. Critically, they have the right not to be arbitrarily forced from their home. In “exceptional circumstances” they can be forced to move, but only when certain conditions are met. These include that any forced removal is authorised by law, proportionate and reasonable in the circumstances, and the development is solely for the general welfare in a society where people can exercise their basic rights.¹⁴⁴ Legal protections must be in place, including access to adequate compensation and legal remedies to inter alia contest the legality of any eviction order. Where these conditions are met, those affected have rights to be meaningfully consulted before the process starts with a view to avoiding or minimising displacement and to be further consulted and involved as the process proceeds. Where indigenous people are affected, more stringent conditions apply, including their mandatory participation in planning and implementing the development.

3.3 Assessment of policy

The Bank’s Involuntary Resettlement policy has been described as “perhaps the most progressive” of its type in the world.¹⁴⁵ So do the Bank’s guidelines lay the foundation for it to meet international standards; does its policy comply with human rights law? On paper the policy would appear to meet many of the requirements of human rights law. There are, however, a number of critical gaps and contradictory provisions that muddy the approach and potentially lead to violations of important rights.

3.3.1 Avoiding involuntary resettlement

Although OP 4.12’s first stated objective is to avoid involuntary resettlement where feasible, somewhat strangely the matter hardly rates a second mention. The overwhelming focus of the policy is on resettlement, rather than the critical issue of trying to avoid the fact.¹⁴⁶ As discussed, international law allows forced relocation only in “exceptional circumstances”. It is therefore crucial – and a requirement under international law - that all viable project alternatives that would avoid the need for evictions are comprehensively explored “in genuine

¹⁴⁴ See *Limburg Principles* [53]-[55].

¹⁴⁵ Barutciski (2006) 82.

¹⁴⁶ Langford (2010) 180.

consultation with the affected persons”.¹⁴⁷ The OP 4.12 does not mention this matter as it pertains to non-indigenous people outside the policy’s objectives. The Bank’s corresponding procedures have one brief reference.¹⁴⁸ The policy gives no detail as to how the Bank “satisfies itself”¹⁴⁹ that all viable options have been explored and makes no mention of the need to consult affected people on this issue. The specific reference in relation to indigenous people in paragraph nine only highlights the lack of emphasis to this matter as it pertains to the general population. In this regard, the policy, arguably, falls short of what is required under human rights law.

3.3.2 Guarding against arbitrary evictions

A glaring omission of OP 4.12 is its failure to guard against becoming involved with arbitrary evictions. As noted, it virtually treats resettlement as a given; it gives no attention to whether the involuntary resettlement would even be legal under international law. This is an important issue for the Bank as many governments it deals with do not extend basic rights and protections to their citizens; and it most certainly has been associated with arbitrary evictions. Recent cases in Cambodia¹⁵⁰ and Albania,¹⁵¹ discussed below, are prime examples.

In countries lacking checks and balances on state power, such as an independent judiciary and rights to free speech, arguably *any* evictions are prohibited under international law.¹⁵² To be more specific, to accord with international law the policy would need to require the Bank to satisfy itself there was a “compelling and overriding public interest” justification for the project, laws were in place to guard against arbitrary eviction, any decisions regarding eviction were made pursuant to law, and any affected persons could effectively challenge such decisions in independent fora and freely express their opinions on the subject. If citizens cannot exercise these rights, the guidelines would need to be clear the Bank could not be involved in the project unless the resettlement element was removed. This would require

¹⁴⁷ *Comment 7* [13].

¹⁴⁸ BP 4.12 [2(b)].

¹⁴⁹ *Ibid* fn.4.

¹⁵⁰ See Inspection Panel *Cambodia: Land Management and Administration Project Investigation Report* (2010) (*‘Cambodia Report’*).

¹⁵¹ See Inspection Panel *Albania: Integrated Coastal Zone Management and Clean-up Project Investigation Report* (2008) (*‘Albania Report’*).

¹⁵² See Alston and Quinn (1987) 203-204; *Limburg Principles* [53]-[55] and discussion above on ICESCR Art 4.

the Bank to assess the political situation in the country, specifically the rights and freedoms enjoyed by the citizens, the independence of the judiciary and issues of corruption. Indeed, this is necessary to abide by the CESCR's directive to international agencies, noted above, that "[e]very effort should be made, *at each phase* of a development project, to ensure that the rights contained in the Covenant are duly taken into account".¹⁵³

3.3.3 Improving or restoring living standards?

A key contradiction of the policy appears in its Objectives. These laudably state resettlement should be conceived as a development project to ensure benefits for displaced persons, and then go on to say that displaced persons should be "assisted in their efforts to *improve* their livelihoods and standards of living" (emphasis added). However - literally in the next breath - they provide a fallback option – that of simply restoring livelihoods and living standards. It begs the question: what is the policy?

There is clearly a big difference in philosophy and approach to the two options. Indeed, global research has shown the 'living standards restoration' option is virtually guaranteed to leave most displaced persons worse off.¹⁵⁴ Anthropologist Ted Scudder, a former commissioner on the World Commission on Dams, says project authorities have tended to take the restoration option as it's cheaper in the short term. This, he says, is "the major reason why the Bank's guidelines have played an impoverishing role in the past and ... will continue to play such a role in the future".¹⁵⁵ Underlying the problem, he believes, is that compensation is given disproportionate emphasis in the guidelines: "[a]uthorities following the 'restoration option' tend to emphasise compensation ... as opposed to providing the sort of development opportunities necessary even to restore livelihoods."¹⁵⁶

¹⁵³ *Comment 2* [6] & [8(d)]. Emphasis added.

¹⁵⁴ Scudder (2005) 279.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* 280; see also Cernea (2009) 50-51; this problem was evident in the *Nigeria: West Africa Gas Project* case, discussed below.

3.3.4 Fair compensation?

The OP 4.12 does provide for “prompt and effective compensation at full replacement cost” for assets directly lost because of the project. According to one analyst the policy’s guarantees relating to compensation cannot be overstated, given many domestic measures do not provide adequate compensation which, in turn, contribute to the failure of many development projects.¹⁵⁷ However, the policy covers only “direct” economic and social impacts.¹⁵⁸ This leads to understating total project impacts, including “critical costs of reintegrating and restarting disrupted economies, social institutions and educational systems” and a wide range of negative cultural and health effects related to loss of home, food security and control over one’s habitat.¹⁵⁹ These hardships - and real costs to affected people - are thus not likely to be compensated. In footnote 5 the policy makes measures to mitigate “adverse” indirect impacts a matter of “good practice” only; that is, they are optional even when “poor and vulnerable” people are affected.

3.3.5 Legal aid and access

The policy requires “appropriate and accessible grievance mechanisms [be] established”.¹⁶⁰ But it doesn’t insist on access to independent courts to contest the lawfulness of any eviction order before displacement and legal aid to enable that to happen. Anthropologist Ted Downing says the lack of legal aid “has consistently undermined the capacity of project-affected people to understand and negotiate for their economic reconstruction”.¹⁶¹ In this regard he believes OP 4.12 “institutionalizes a negotiating system that potentially violates human rights”. He points out the policy allows the Bank to underwrite the borrower’s cost of negotiating with the displaced, but not visa versa.¹⁶² In these matters the policy arguably falls short of what is required under human rights law.

¹⁵⁷ Barutciski (2006) 82.

¹⁵⁸ OP 4.12 [3].

¹⁵⁹ Downing (2002) 13-14.

¹⁶⁰ OP 4.12 [13(a)].

¹⁶¹ Downing (2002) 13-14.

¹⁶² Ibid.

3.3.6 Concluding comment on policy

It could be argued the entire Involuntary Resettlement policy is aimed at protecting a range of rights from economic to political - and for this the Bank should be commended. It is interesting to note the Bank's Inspection Panel has found "human rights implicitly embedded in various policies of the Bank".¹⁶³ In certain cases, the Panel has relied on this to justify examining the human rights implications of a project and assessing Bank performance against international standards.¹⁶⁴ As discussed, there are a number of important gaps in the policy in meeting international standards. However, the Panel has demonstrated (discussed below) that international standards are those by which the Bank can and should be held accountable.

¹⁶³ Ayensu (2010) [8] ('*Chad Statement*').

¹⁶⁴ See eg. Inspection Panel *Chad-Cameroon Petroleum and Pipeline Project Investigation Report* (2002) ('*Chad Report*') [210]-[217].

4 The complaint system and human rights

*The Panel's work has a limited role and impact in international law as it is not permitted to address the project-related issues by applying the most advanced principles of ... international law, mainly those related to human rights, environment and climate change.*¹⁶⁵

This comment by the complainants' representative in the first case investigated by the World Bank's Inspection Panel ('Panel') reflects some of the limits of the body set up to provide independent oversight of the Bank's lending activities. As noted, the establishment of the Panel in 1993 was a breakthrough in international accountability as the Bank became the first international development financial institution to establish its own 'independent' oversight body.¹⁶⁶ Although it reports to the Board of Executive Directors ('Board'), the Panel was primarily designed to provide *public* accountability; it was created "for the purpose of providing people directly and adversely affected by a Bank-financed project with an independent forum through which they can request the Bank to act in accordance with its own policies and procedures".¹⁶⁷

4.1 Mandate and structure

The Panel comprises three members appointed by the Board for five-year terms. Its key role is to investigate complaints from two or more people who claim to have been harmed by Bank-financed projects, and then report its findings to the Board. The complaint must relate to "serious" actual or threatened harm directly resulting from "a failure of the Bank to follow its operational policies and procedures".¹⁶⁸ After the complaint is received it's sent to Bank management (Management) to respond; the Panel independently assesses the complaint and

¹⁶⁵ Gopal Siwakoti, Requester in Arun III, Nepal, cited in Inspection Panel (2009) 51.

¹⁶⁶ See *Resolution No. IBRD 93-10; Resolution No. IDA 93-6* (22 September 1993) ('1993 Resolution').

¹⁶⁷ Inspection Panel (2001) 50.

¹⁶⁸ *1993 Resolution* [12]-[13].

Management's response then recommends to the Board whether the matter should be investigated. If approved by the Board, the Panel conducts the investigation. Its findings are presented to the Board and Management. The latter then has six weeks to report to the Board on its response and actions it proposes to take; this usually takes the form of an 'action plan'. The Board then decides on what action will be taken, in many cases adopting the 'action plan'.¹⁶⁹

So how effective is the Inspection Panel? Does the process respect the rights of complainants; does it provide sufficient accountability and redress for those whose rights have been violated? The Panel process undoubtedly has had a significant impact on the culture of the Bank and forced it to pay greater attention to its safeguard policies. In many cases the Panel investigations have resulted in tangible outcomes for complainants. The Bank has completely withdrawn from some projects; this happened with the Arun power project in Nepal, the very first case investigated by the Panel,¹⁷⁰ and a controversial Chinese project involving population transfers into a Tibetan/Mongolian autonomous region.¹⁷¹ Other projects have been substantially modified and resettlement programmes improved.¹⁷² But there are some serious limitations in the Panel's structure and processes that clearly suggest while the Bank wants to be seen to be 'doing something', it does not want effective accountability. In 2001 the CECSR identified a standard for assessing human rights accountability mechanisms of international organisations; at a minimum they must be "accessible, transparent and effective".¹⁷³ As discussed below, despite best efforts by the Panel, the process falls well short of meeting this standard. This chapter first looks at some structural issues limiting effectiveness, before examining Panel practices designed to enhance respect for rights.

¹⁶⁹ Inspection Panel (2009) 43.

¹⁷⁰ See Inspection Panel *Proposed Arun III Hydroelectricity Project Investigation Report* (1995).

¹⁷¹ See Inspection Panel *China – Western Poverty Reduction Project Investigation Report* (2000) ('China Report').

¹⁷² Clark, Fox and Treacle (2003) 258; Bridgeman (2007) 2.

¹⁷³ CESCR, *Poverty and the ICESR*. Statement adopted 4 May 2001, [14]; see also *Ruggie Guidelines* [31].

4.2 Structural issues limiting rights

4.2.1 Rough road to a remedy

One of the glaring deficiencies in the complaint process is the lack of commitment by the Bank to a remedy for people harmed by its' actions. This is demonstrated in a number of ways. Firstly, the Panel's findings are not binding; it's primarily an investigative body with no authority to order, or even recommend, a remedy. It's totally a matter of discretion for the Board, a political body comprising members with various competing interests, as to what actions, if any, it decides to take in response to the Panel's findings.

Secondly, and perhaps more concerning, is that in exercising this discretion the Board has deliberately restricted its own ability to adequately respond by excluding the Panel from assessing and monitoring Management's 'action plans' that are meant to rectify the problems, as will be discussed below. The Panel's exclusion from this role is indeed odd as the Panel often spends many months investigating the complaint, including field visits, and clearly has expertise to assess Management's proposals and inform Board decisions. The irony of leaving Management, without oversight, to plan and report on remedies was not lost on one Brazilian claimant who commented that it belied "the concept of accountability to allow the creation and supervision of remedies to be conducted by the very same people ... responsible for the violations in the first place".¹⁷⁴

Indeed, an independent study has found that although the creation of 'action plans' by Bank staff has become more professional since 1999, a significant number of Panel findings of non-compliance "still go unanswered" by Management, leaving many requesters' concerns unresolved.¹⁷⁵ It was thus concluded that despite the Panel's rigorous investigations, "it is hard to sustain credibility when the right to complain and be heard is not matched by a right to a remedy".¹⁷⁶

¹⁷⁴ Bridgeman (2007) 7.

¹⁷⁵ Ibid 3-5.

¹⁷⁶ Ibid 7.

4.2.2 Switching off the spotlight

The lack of an independent monitoring role for the Panel to ensure any proposed remedial actions effectively address the problem is a key deficiency of the process. As noted, this role was explicitly denied the Panel in a 1999 clarification by the Board: “The Board should not ask the Panel for its view on ... the action plans nor would it ask the Panel to monitor the implementation of the action plans.”¹⁷⁷ While denying the Panel this role, the Board hasn’t created any other mechanism to do this.¹⁷⁸ It begs the question: is the Bank afraid of finding out whether remedial action it commits to is implemented and/or effective? Or as one claimant asked: “Does the Bank take its own Panel seriously?”¹⁷⁹ The Panel itself is clearly disturbed by this constraint on its powers and has drawn attention to critics’ comments that this reduces accountability at the critical stage of taking positive reparative action, effectively “reducing the process to simply pointing out the Bank’s failures”.¹⁸⁰

Despite the clarification, there have been cases where the Board has requested the Panel to oversee actions being taken to rectify harms. These included the *Mumbai Urban Transport Project* (‘*Mumbai Project*’) where the Panel had found serious policy violations regarding the resettlement of more than 120,000 people. In that case the Panel carried out its monitoring role as an “independent fact-finding” assessment and its report documented many on-going problems.¹⁸¹ It was not asked by the Board, however, for a further follow-up report. These cases, though, where the Board has specifically asked for Panel follow-up have been the exception, rather than the rule. They demonstrate the Board does recognise the need for Panel follow-up for effective oversight, but they also highlight the Board wants to be selective about this level of accountability.

In some cases a second request has been made to the Panel, alleging failure of the Bank to implement action plans resulting from an earlier request. One concerned the *Bujagali Hydropower Project* in Uganda where the lead complainant expressed frustration at the need

¹⁷⁷ See: World Bank (1999), *Conclusions of the Board’s Second Review of the Inspection Panel* BP 17.55, Annex C [15]-[16] (‘Second Review’).

¹⁷⁸ Bridgeman (2007) 5-6.

¹⁷⁹ Ibid 6.

¹⁸⁰ Inspection Panel (2009) 57 quoting Lori Udall.

¹⁸¹ Inspection Panel *Progress Report India: Mumbai Urban Transport Project* (2007) (‘*Mumbai Progress Report*’).

to file a second complaint: “[the Panel] should *keep informing* the Board of the status – the Panel is not as helpful if they write a report and then forget”.¹⁸² In this and several other cases examined, an independent study found the situation improved while the Panel was watching then deteriorated again when the spotlight faded.¹⁸³

4.2.3 Restricted access

A serious obstacle to accountability is an eligibility criteria that complaints cannot be heard by the Panel if the relevant Bank loan has already been at least 95 percent disbursed.¹⁸⁴ This is potentially a major problem as loan funds are often disbursed early in the project cycle, but many problems relating to involuntary resettlement often come to light after this period. Thus, there is effectively no accountability for projects after this 95 percent cut-off date, the period when most of the implementation is taking place.¹⁸⁵ This prevented the Panel considering a recent complaint filed in relation to a project in Cameroon. In correspondence with the complainants the Bank had acknowledged on-going problems related to the forced eviction of about 500 people; the Panel noted in its report the “many significant concerns” of the Requesters and their perception the Bank had promised to deal with their problems [but had not].¹⁸⁶

A further criteria restricting access is a requirement the problem must have earlier been brought to Management’s attention. This was recently an issue in a Colombian case where the Panel ruled the complaint ineligible despite the fact it raised serious issues relating to involuntary resettlement. The Requesters had raised their concerns with the government implementing body but not directly with the Bank during a supervision mission; the Panel noted the difficulty for the complainants to know “about the possibility of bringing their problems directly to the Bank and how to do it”.¹⁸⁷

¹⁸² Bridgeman (2007) 7.

¹⁸³ Ibid.

¹⁸⁴ See 1993 Resolution [14(c)].

¹⁸⁵ Clark (2008) 631-632.

¹⁸⁶ Inspection Panel *Cameroon Urban Development Project Notice of Receipt for Inspection and Decision Not to Register* (2007) 2.

¹⁸⁷ Inspection Panel *Colombia: Bogota Urban Services Project Report and Recommendation on Request for Inspection* (2007) [45].

Indeed, the Panel has expressed frustration at the lack of effort by the Bank to raise awareness of both the Bank's involvement in projects in borrower countries and the existence of the complaints mechanism. Pursuant to the 1999 *Second Review*, Management is required to promote awareness of the Panel's role. However, the Panel states there has been "no systematic efforts" in this regard, compromising the participatory nature of the Panel process from the outset.¹⁸⁸

4.2.4 Participation - but not *too* much

When the Panel completes its report, Management is given the opportunity to review the findings and make recommendations before the Board meets to consider the report. The complainants, by contrast, are not even given access to the report before the Board meeting. This effectively limits complainants' participation at this crucial stage, and creates a serious imbalance in access to the Board by the two sides of the dispute.¹⁸⁹ This has been a major issue for complainants¹⁹⁰ and others concerned that it fails to give affected people "a true voice in the outcome of the investigation".¹⁹¹

Also of concern has been the complainants' lack of input into the 'action plan'. Observers have noted the Board tends to adopt these plans "ignoring the experience, knowledge, and preference of the people who triggered the process in the first place".¹⁹² The *Second Review* of the Panel called for Management to consult with complainants before submitting 'action plans' to the Board. However, the Panel itself has highlighted the fact that as the review did not allow disclosure of the Panel's investigation report at this stage to the complainants, it's clearly difficult for them to meaningfully engage in the preparation of remedial steps.¹⁹³

¹⁸⁸ Inspection Panel (2009) 48, 102.

¹⁸⁹ Clark (2008) 632.

¹⁹⁰ See Bridgeman (2007) 2-3.

¹⁹¹ Carrasco and Guernsey (2008) 5.

¹⁹² Clark, Fox and Treake (2003) 267; see also Udall (2008) 9.

¹⁹³ Inspection Panel (2009) 41.

4.2.5 Degrees of independence

The Panel stresses the vital importance of ‘independence’ for its operations.¹⁹⁴ Yet it acknowledges it has been facing serious challenges in maintaining its “independence, integrity and impartiality”.¹⁹⁵ One recurring problem has been the fact the decision as to whether an investigation should proceed is a matter for what is essentially a political body, the Board, not the Panel. In the Panel’s early years, Management directly lobbied Board members to prevent investigations proceeding, and in some cases was successful.¹⁹⁶ In 1999, an agreement was reached whereby the Board would not question the Panel’s recommendation to proceed with investigation as long as the basic eligibility criteria was met. For a period after, the process worked smoothly.¹⁹⁷ However, recently, within the space of a year the Board closely questioned the Panel over its recommendation on whether an investigation was warranted in at least four cases, instead of approval on a ‘non-objection’ basis as had become the practice.¹⁹⁸ In a statement to the Board in one of these cases, a clearly frustrated Panel Chairman Robert Lenton concluded by saying:

*I would like to reiterate that the Panel is an instrument of the Board and as such, subject to its oversight and guidance. To effectively perform its functions, however, it needs a degree of independence and credibility that up to now has been assured by this Board.*¹⁹⁹

Not only does the Panel’s lack of decision-making power over investigations compromise its independence, it diminishes the Panel’s ability to be seen to be independent.²⁰⁰

4.2.6 Limited mandate regarding rights

The Panel is authorised only to investigate cases where it’s alleged that harm has resulted (or is likely to result) from the Bank’s failure to follow its own policies. This focus on policy “excludes people affected by projects where policies may not have been directly violated, but

¹⁹⁴ Inspection Panel (2009) 18.

¹⁹⁵ Inspection Panel (2011) ix (‘2011 Annual Report’).

¹⁹⁶ Bradlow (2005) 460.

¹⁹⁷ Ibid.

¹⁹⁸ 2011 Annual Report ix.

¹⁹⁹ Lenton (2010).

²⁰⁰ Carrasco and Guernsey (2008) 32.

which have negative impacts nonetheless”.²⁰¹ Given the Bank has no specific policy on human rights, this can potentially include serious rights violations. For example, in some cases projects have triggered political repression, but the Panel has been very cautious in exploring these matters because of sensitivities within the Bank about this “delicate topic”,²⁰² and the need to link it to Bank policy. This was evident in the *Chad-Cameroon Petroleum and Pipeline Project* case where the lead complainant was tortured.²⁰³ This case is discussed further below; suffice to say here the Panel’s discussion on human rights issues concluded with the understatement that “the situation is far from ideal. It raises questions about compliance with Bank policies, in particular those related to informed and open consultation, and it warrants renewed monitoring by the Bank”.²⁰⁴ Thus broader issues of responsibility for harms resulting from the project were not explored.²⁰⁵

4.3 Panel practices to enhance rights

The Panel is very mindful of the limitations on its structure and mandate which impact on the rights of affected people to access the complaints process, to participate in determining outcomes and, ultimately, to obtain a remedy. It is also mindful many people have had their rights trampled – some very seriously - in trying to challenge the Bank by utilising the complaints process.²⁰⁶ The Panel has sought to overcome some of these shortcomings by conducting investigations that are widely viewed as thorough and fair²⁰⁷ and simplifying its processes as much as possible. Accordingly, complaints (known as Requests for Inspection) can be submitted as a simple handwritten letter in any language and do not need to refer to specific Bank policies; with information on the harm and alleged Bank failing, the Panel says it will make the links with policy.²⁰⁸ It has also developed some practices to help mitigate its structural constraints and promote the rights of affected people, as discussed in the next sections.

²⁰¹ Clark, Fox & Treakle (2003) 267.

²⁰² Inspection Panel (2009) 50.

²⁰³ See *Chad Report* [216].

²⁰⁴ Ibid [217].

²⁰⁵ See *ibid* 61-62.

²⁰⁶ Inspection Panel (2009) 49.

²⁰⁷ Bridgeman (2007) 3.

²⁰⁸ Inspection Panel (2009) 24.

4.3.1 Promoting effective remedies

Aware that the main reason people trigger the Panel process is to seek a solution to their problems, the Panel has established procedures to enhance opportunities for problem solving, especially during the initial phases. The idea is that once a complaint has been filed, the Bank has a strong incentive to explore solutions with complainants, thus avoiding need for a full investigation. The Panel says this approach is only adopted if complainants are in favour and the Panel believes Management is sincerely addressing the concerns. This approach has successfully resolved problems in a number of cases, but not others; it was successful in three recent involuntary resettlement cases²⁰⁹ – one in India and two in Kazakhstan – while it was not successful in the *West Africa Gas Pipeline* case, discussed below.

Given the Panel's core function of providing accountability through investigations, there are dangers of a conflict of interest. Serious problems may not be fully uncovered or understood without full investigation. However, the practice promotes the prospect of an early remedy, and from the complainant's perspective may be the preferred path.

4.3.2 Mitigating lack of oversight

The Panel clearly has been frustrated at its lack of oversight of Bank actions to rectify harms.²¹⁰ To mitigate this shortcoming, since 2004 the Panel has established a practice of returning to the affected area after the Board meeting to brief complainants on the outcome of its investigation and Management's response, including the 'action plan'. The idea is to ensure complainants are fully aware of the plan - and that it represents a 'new commitment' by the Bank - so they can continue to actively monitor it in a manner the Panel cannot. Informally in some cases - such as with the displaced Mumbai shopkeepers, described below - the Panel has continued to play a role by passing on information from complainants to the top-levels of the Bank.²¹¹

²⁰⁹ See Annex A, No. 12, 15 & 19.

²¹⁰ Inspection Panel (2009) 44-45.

²¹¹ Ibid 59.

4.3.3 Promoting explicit respect for rights

The Panel in a number of cases has explicitly tackled what it describes as the “sensitive subject”²¹² of human rights, thus injecting a more rights-based approach into the system. The Panel, however, has been rather cautious regarding the issue, saying it was mindful of the two Shihata legal opinions, discussed earlier.²¹³

4.3.3.1 Confronting ‘sensitive subjects’

In examining the *Chad-Cameroon Petroleum and Pipeline Project* (‘*Chad Project*’) – the largest energy infrastructure project on the African continent - the Panel “for the first time”²¹⁴ felt obliged to look at human rights more directly.²¹⁵ Governance and the human rights situation in Chad had been directly raised in the Request for Inspection by a complainant who said he’d been tortured because of his opposition to the project. His case had been documented by Amnesty International; indeed, the Bank’s President “on more than one occasion” personally intervened to get the complainant and others released from jail.²¹⁶ In response to the complaint, Management had said it was constrained by the *Articles* to consider human rights issues unless they had a “significant direct economic effect” on the project; in this case it felt the project could “achieve its development objectives”, thus rights were no direct concern.²¹⁷

The Panel, however, took issue with Management’s “narrow view”.²¹⁸ To the contrary, as noted, it found human rights were “implicitly embedded” in Bank policies.²¹⁹ Moreover, human rights analysis was relevant to determine if violations were “such as to impede implementation of the Project in a manner compatible with the Bank’s policies”. The situation in Chad – where inter alia consultations had been held in the presence of armed soldiers - raised serious questions about Bank compliance with its policies, specifically those

²¹² See *Chad Statement* [8].

²¹³ Inspection Panel (2009) 50.

²¹⁴ *Ibid.*

²¹⁵ *Chad Report* xvi [35].

²¹⁶ *Ibid* [213].

²¹⁷ *Ibid* [212].

²¹⁸ *Ibid* [214].

²¹⁹ See *Chad Statement* [8].

relating to informed and open consultation.²²⁰ Panel Chairperson Edward Ayensu subsequently advised the Board:

*The human rights situation in Chad exemplifies the need for the Bank to be more forthcoming about articulating its role in promoting rights within the countries in which it operates. The Bank policies on consultation, among others, presume a basic respect for human rights ... [and] perhaps this case should lead ... to a study [of] the wider ramifications of human rights violations as these relate to the overall success or failure of policy compliance in future Bank-financed projects.*²²¹

It would not appear as if that study has been undertaken – or at least not publicly released - but the Panel has clearly told the Bank it needs to adopt a far broader approach.

4.3.3.2 Compliance with international treaties

In another case that directly raised human rights issues - the *Honduras Land Administration Project* – the Panel made a number of potentially far-reaching comments and findings. The case involved a claim by the indigenous Garifuna people that their rights to their ancestral lands would be harmed by the project that was aimed at reforming the country's land tenure system. One of their claims alleged the project violated the Government's commitments under *ILO Convention 169*. The Panel took care not to comment on the Government's actions in implementing the treaty, but found the Bank's policy on project appraisal, OMS 2.20, gave rise to an independent responsibility for the Bank to ensure the project plan and implementation was consistent with this treaty.²²² This policy requires the Bank to ensure a project's effects on the environment and "health and well-being" of the people do not violate any international agreements applicable in the project area.²²³ The Panel concluded the Bank had not adequately considered *Convention 169* as required.²²⁴

²²⁰ *Chad Report* [217].

²²¹ *Chad Statement* [8].

²²² Inspection Panel *Honduras Land Administration Project Investigation Report* (12 June 2007) [258] ('*Honduras Report*').

²²³ *Ibid* [253], [255] citing *Operational Manual Statement 2.20*.

²²⁴ *Ibid* [258].

In this case the Panel is clearly requiring the Bank to ensure its projects are consistent with international agreements addressing human rights (as these naturally pertain to the “health and well-being” of citizens) when the relevant country is a signatory.²²⁵ It is significant this finding was made despite the objection of the Bank’s own legal counsel.²²⁶ Significantly, the Panel further noted both the ILO and the Bank were specialised UN agencies, providing “an additional reason” for the Bank to refrain from financing activities inconsistent with *Convention 169*.²²⁷ Here the Panel would appear to be implying moral, if not legal, duties. The Panel is thus stating the Bank should observe all UN treaties, and, by extension, declarations and guiding principles. Together these provide a firm foundation for requiring the Bank to respect an array of rights based on the *UN Charter*, international conventions, related General Comments and judicial decisions.²²⁸

4.3.3.3 Consistency with domestic laws

In the Honduran case the Panel also indicated domestic laws were also relevant to an assessment of Bank policies,²²⁹ and in other situations this may used to protect human rights where local provisions are more strongly protective of rights.²³⁰ The context in the Honduran case was the Bank’s policy on Indigenous People which requires an assessment of the domestic legal status of indigenous groups and their ability to effectively use the legal system to defend their rights.²³¹ The Panel thus noted “bank policies” recognised the “importance of the legal context in which a project was designed and implemented” and this required the Bank to analyse the impact of local laws to ensure they did not undermine protections provided for in Bank policies.²³² Other Bank policies relevant to involuntary resettlement support the contention this works both ways ie. the Bank must abide by local standards if indeed they provide more protection than Bank policies.²³³ These include OP 4.01 that requires the environmental assessment to take into account the country’s overall policy framework and national legislation related to social (and environmental) aspects of the

²²⁵ See Inspection Panel (2009) 75.

²²⁶ *Honduras Report* [254].

²²⁷ *Ibid* fn.152.

²²⁸ Herz and Perrault (2009) 2.

²²⁹ *Honduras Report* [242].

²³⁰ Herz and Perrault (2009) 10.

²³¹ *OP 4.10 - Indigenous People*.

²³² *Honduras Report* [242].

²³³ Herz and Perrault (2008) 10.

project²³⁴, while OP 7.00 states the Bank “tries to work within existing law to the extent possible”.²³⁵ The Panel has implicitly approved this analysis.²³⁶

4.3.3.4 Other approaches

The Panel has also made other references to human rights that emphasise it will not allow the Bank to hide behind its *Articles* to avoid human rights issues. Indeed, in the *Chad Report*, the Panel drew attention to the Bank’s own public rhetoric on the 50th anniversary of the *UDHR* that:

*[T]he World Bank believes that creating the conditions for the attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being – especially the poorest – at the foundation of its approach to development, the Bank helps people in every part of the world build lives of purpose and hope And ... the Bank **has always taken measures to ensure that human rights are fully respected in connection with the projects it supports** ...*²³⁷

The logical conclusion from this is that the Bank should be held to its own professed standards, that is, to fully respect human rights. Thus, it can be argued the Panel is entitled to interpret all substantive provisions of the Bank’s policies by international rights standards. Given the Panel drew attention to this statement indicates it should increasingly be prepared to do so.

The Panel has also directly raised incidents of abuse and instituted steps, like confidentiality mechanisms, to try to boost protection for those involved in the complaint process.²³⁸ In these myriad of ways the Panel has been injecting a human rights perspective into its review of Bank activities; it has criticised the Bank’s ‘narrow approach’, called for the Bank to undertake a comprehensive study on the connections with its projects, highlighted the need

²³⁴ OP 4.01 - *Environmental Assessment* [3].

²³⁵ OP 7.00 - *Choice of Borrower and Contractual Agreements* [14]; see Herz and Perrault (2009) 10.

²³⁶ Inspection Panel (2009) 77 fn.58.

²³⁷ *Chad Report* [214] citing World Bank (1998a) 2 (emphasis added).

²³⁸ Inspection Panel (2009) 49-50.

for more systematic assessments of risks of a “political economy nature”²³⁹ and has indicated that, in a broad range of circumstances, it will hold the Bank accountable against international human rights standards.

4.4 Conclusion on Inspection Panel

There is little doubt the Panel is widely respected for its impartiality and investigative rigor. Even though it is only a quasi-judicial mechanism, Washington’s Centre for Environmental Law says the Panel’s reputation is such that its findings may be persuasive in other domestic or international human rights bodies.²⁴⁰ It has, however, been seriously constrained by its mandate and has had mixed results as a tool to promote accountability and ensure compliance with policies meant to protect the rights of those affected by development projects.

The Panel has served as a useful tool to shed light on problems and has used its powers to confront the Bank with a broader analysis of the human rights implications of its work. In a number of its reports it has indicated the Bank needs a far “better” approach, as discussed further below. But, despite its best efforts, the Panel cannot ensure a satisfactory outcome for those who resort to it for help; in short, while it plays a valuable role, it neither protects the right to a remedy nor effectively holds the Bank to account. In these critical structural areas it falls short of international standards.

²³⁹ 2011 Annual Report 12.

²⁴⁰ Herz and Perrera (2009) 15.

5 Bank resettlement practice and human rights

So what is the *current* Bank practice on involuntary resettlement? Is the Bank adhering to its policies when dealing with communities living in the way of developments it's funding? A number of analysts say the Panel undoubtedly has had a positive impact on Bank practices, inter alia focusing greater attention on the safeguard policies and need for compliance.²⁴¹ In this regard it's interesting to note that in its *China Report* in 2000, the Panel was alarmed to find among Bank staff a "disturbingly wide range of divergent and, often, opposing views" on how the operational policies should be applied, with some viewing them simply as "idealized policy statements".²⁴² In the intervening years, it's to be hoped greater clarity and consistency has emerged in the way the Bank approaches involuntary resettlement, given the purported binding nature of the policies. The Bank itself, however, has not carried out a comprehensive review of its resettlement projects since 1994,²⁴³ and there is no systematic reporting on the rehabilitation status of those displaced.²⁴⁴ A 1998 internal Bank study of eight major dam projects involving involuntary resettlement found the Bank had not effectively intervened to support income recovery, and only showed "intermittent interest" in providing follow-through support for resettlement, usually exiting the project before staff could even "determine the probability of reaching the Bank's overarching objective of restoring or improving incomes and standard of living".²⁴⁵ This chapter examines the Bank's more recent practice through the lens of the Inspection Panel.

Of the 76 formal requests received by the Panel to October 2011, almost half (38) alleged violations of the Involuntary Resettlement policy, among other issues. Of these, 19 were

²⁴¹ Clark (2008) 630; see Clark, Fox & Treakle (2003) 270.

²⁴² *China Report* xiv-xv.

²⁴³ World Bank (1994).

²⁴⁴ Clark (2008) 638.

²⁴⁵ World Bank (1998b) [10].

reported on, or received by, the Panel during the past six years. These cases are the focus of this assessment of *current* field practice.²⁴⁶ Of these, the Panel conducted full investigations in eight cases where one of the issues directly involved involuntary resettlement, while three cases were resolved to the satisfaction of Requesters without a full investigation. The other cases had various outcomes or are still pending: see Annex A.

A review of these Panel cases points to some genuine efforts by the Bank to implement the Involuntary Resettlement policy adequately. For example, in the *Pakistan Project* when the Government rejected provisions in the resettlement plan, earlier agreed with the Bank, the latter withdrew funding from project components believed to require resettlement.²⁴⁷ Nonetheless, serious – and indeed life-threatening – deficiencies in implementing the policy were uncovered by the Panel in that case due to, inter alia, a failure to fully identify those affected. This is one of a number of systematic problems which would appear to continue to plague Bank practice involving involuntary resettlement;²⁴⁸ some key issues are discussed below.

5.1 Considering alternatives

Inadequate attention to avoiding or minimising involuntary resettlement remains a recurring problem.²⁴⁹ In its investigation into the *Mumbai Project* the Panel identified a myriad of policy violations regarding the involuntary resettlement of more than 100,000 people to make way for the upgrading of the city's transport system.²⁵⁰ The Panel received four separate complaints from people ranging from the very poor to middle-income shopkeepers who were to be displaced by the project. The massive resettlement was initially planned as a separate operation but later merged with the infrastructure project, and drastically scaled down. This was no small problem as the State-agency that became responsible had no staff experienced in resettlement planning.²⁵¹ In their complaint, some shopkeepers demanded the road widening be limited to prevent their dislocation. The Panel found they had been given no alternatives to designated resettlement sites for their shops and there had been no

²⁴⁶ See Annex A.

²⁴⁷ *Pakistan Report* xxxiii.

²⁴⁸ Inspection Panel (2009) 72.

²⁴⁹ *Ibid.*

²⁵⁰ *Mumbai Report*.

²⁵¹ *Ibid* xviii.

consideration of alternative road alignments that may have made their displacement unnecessary, although possibilities existed.²⁵²

The Bank also failed to consider alternatives in a recent case in Ghana involving a project to construct a sanitary landfill in Greater Accra (*'Ghana Project'*).²⁵³ The project was vehemently opposed by the Agyemankata people who lived and worked around the 194 hectare site. The landfill would divide their community, with some forced to relocate while others would remain. Despite their opposition, the Panel found the Bank had not considered any alternative sites that would have avoided resettlement. Site selection had largely been “taken . . . for granted” based on an outdated study done more than 10 years earlier when the environment was very different.²⁵⁴

5.2 The challenge of restoring livelihoods

A key aim of the Involuntary Resettlement policy is to ensure those forcibly displaced are not left impoverished; indeed, it promises to help them improve their livelihoods, or at least restore them. This continues to be a major challenge for the Bank.

In the *Mumbai Project* restoring incomes was not given any priority in the planning, such as it was. One particular group overlooked was hundreds of shopkeepers and business people operating timber, metal, textile, automotive and other enterprises. Their needs were not properly assessed; the smaller replacement shop areas offered made it difficult for some to run their businesses, while the poor locations meant most were likely to suffer a significant fall in income. The resettlement site also lacked adequate water and had sewerage and pollution problems.²⁵⁵

Indeed, in general, the Panel found the Bank had “paid scant attention to income restoration,” assuming jobs would not be a problem in the city.²⁵⁶ In contrast the Panel found

²⁵² Ibid [648]-[649].

²⁵³ Inspection Panel *Ghana: Second Urban Environmental Sanitation Project (UESP II) Investigation Report*, (2009) (*'Ghana Report'*).

²⁵⁴ Ibid xiv-xv, xxi.

²⁵⁵ *Mumbai Report* xxv.

²⁵⁶ Ibid xxvi.

impoverishment was a major problem;²⁵⁷ many had lost jobs and income, especially women, small-scale traders and daily workers. They also faced higher living costs, resulting in children being taken out of school and families losing power and water services when they could not pay their bills.²⁵⁸ It would appear there was no attempt to abide by the laudable policy goal to conceive the resettlement as a development project, with no training or other income-generating activities provided.²⁵⁹ The Panel also found the poor quality, or absence, of baseline income surveys would, in any event, make it difficult for the Bank monitor income restoration as required under the policy. As noted, this was one case where the Panel was given a role in monitoring Management's activities to rectify the problems. Eighteen months later, however, the Panel reported the situation of the shopkeepers still had not been resolved.²⁶⁰ Regardless, the Panel was given no further formal monitoring role.

Income restoration was also an issue in the *West African Gas Pipeline Project* ('*West Africa Project*'). Twelve communities affected by the project in Nigeria filed the complaint alleging it would inter alia damage their lands and destroy their livelihoods. In Nigeria more than 2,500 landowners and tenant farmers lost land to the project. Complainants alleged many of those affected were not consulted and where compensation had been paid, in most cases, it was less than four percent of market rate.²⁶¹

In its initial response Management stated the project was well-prepared and met the Bank's safeguard requirements.²⁶² The Panel, however, found "significant flaws" in applying the Involuntary Resettlement policy, including a lack of necessary measures to avoid impoverishment.²⁶³ As in the *Mumbai Project*, the Panel found totally inadequate baseline data underlying the problem. The complexities of the traditional land tenure system were not considered and the size of the affected population considerably underestimated.²⁶⁴ Although people lost land, they were not offered land-based options as a viable means of income restoration as emphasised in OP 4.12. Rather they were given cash compensation at rates

²⁵⁷ Ibid xxvii.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ *Mumbai Progress Report*.

²⁶¹ See Inspection Panel *Nigeria: West African Gas Pipeline Project Investigation Report* (2008) ('*West Africa Report*') [104]-[105].

²⁶² Ibid [112]-[113].

²⁶³ Ibid xiv.

²⁶⁴ Ibid xv- xvi.

one-tenth of that stated in the resettlement plan. Further, the Panel found the plan “transferred the burden for restoration of livelihoods onto the displaced persons without providing additional assistance as called for in Bank policy”.²⁶⁵ As in the *Mumbai Project*, the requirement to design resettlement as a development project had been ignored.²⁶⁶ At the time of the Panel’s visit, Management had acknowledged the flaws in compensation. But it was still ignoring critical issues including consultation with affected persons, identification of vulnerable persons and assessment of whether cash payments were even appropriate to avoid project-induced impoverishment.²⁶⁷

In its 2007 investigation of the *Uganda: Private Power Generation (Bujagali) Project*, the Panel found thousands of farming and fishing families forcibly moved during an earlier Bank-supported attempt to build a dam at the Bujagali Falls were still suffering adverse effects in terms of their incomes and livelihoods. These people were essentially “left in limbo” and did not receive key elements of the resettlement process when the Bank withdrew its support, and the Ugandan Government dropped the earlier project. Many expressed frustration over broken promises to restore their livelihoods, and failure to compensate for lost assets. The Panel found the original resettlement plan had not made provision for helping those displaced restore incomes and the later project had failed to properly address these issues.²⁶⁸ Panel Chairperson Werner Kiene subsequently told the Board:

*...several key Panel findings are incompletely addressed in the [Management] Response and Action Plan including on resettlement ... I am pleased that during the Board meeting Management has expressed a commitment to address the critical issues raised. The Panel is optimistic that a Project costing several hundred million dollars can fully restore the livelihood losses among the 2,500 families who are inadvertently in its pathway.*²⁶⁹

In the *Pakistan Project*, too, no action was taken to assist thousands of extremely poor people even though they had been identified in a Bank fact-finding mission of being at “major risk”

²⁶⁵ Ibid xvii.

²⁶⁶ Ibid xix.

²⁶⁷ Ibid xviii.

²⁶⁸ Inspection Panel *Uganda: Private Power Generation (Bujagali) Project Investigation Report* (2008) xliii-xlvii.

²⁶⁹ World Bank (2008).

of loss of livelihood²⁷⁰ due to project-related impacts. As noted above (page one), these people had been completely left out of the ‘field of vision’ by project planners.²⁷¹ A later Bank report had noted that as these affected people were politically and economically depressed they “would not be compensated unless an arm like the World Bank takes up their cause”.²⁷² And yet it was not until the request was submitted to the Panel that Management devoted significant resources to develop “long-overdue” responses.²⁷³

5.3 Failure to trigger policy

In two recent cases, a key deficiency was the Bank’s failure to even trigger application of the Involuntary Resettlement policy as a safeguard for affected people. The Panel says this has been a recurring problem.²⁷⁴ In both cases, the forcible evictions were not initially recognised as being associated with the Bank projects. In one case involving Albania, Management went to considerable lengths to block information that proved otherwise. In the second case, involving Cambodia, the Bank readily admitted the linkages after rumours surfaced of a complaint to the Panel.

The Albanian case involved the eviction of a group of families living in Jale, a village along the southern coast. Most of the villagers had lived there for generations. Those targeted were told they did not have building permits for their houses and were given notice by authorities their homes would be demolished. In 2007 the complainants alleged the demolitions had nothing to do with permits but were connected with a Bank-financed project - *Albania: Integrated Coastal Zone Management and Clean-up Project* (‘*Albania Project*’) – and carried out in violation of Bank policy. Allegations were also made the demolitions were linked with corrupt officials who were using the project for their own purposes.

Bank Management initially denied any link between the demolitions and the project; further it claimed that before the project was approved, the Government had agreed to a moratorium on demolitions until necessary protections were in place.²⁷⁵ The Inspection Panel, however,

²⁷⁰ *Pakistan Report* 114.

²⁷¹ *Ibid* 124.

²⁷² *Ibid*.

²⁷³ *Ibid* xxxvi.

²⁷⁴ Inspection Panel (2009) 72.

²⁷⁵ *Albania Report* xiii, xv-xvi.

found a rather different situation. Firstly, it discovered the Government had not agreed to any moratorium; Management had misrepresented this fact in the project appraisal document, to the Panel and the Board.²⁷⁶ Secondly, the Panel found clear links between the project's aims and activities and the Government's demolition programme.²⁷⁷ It also uncovered – despite vigorous resistance from Management – significant documentary evidence directly linking the project to the demolitions.²⁷⁸ Furthermore, an internal fact-finding mission sent to the area had failed to “find” key facts, materially misrepresenting the situation.²⁷⁹

The Panel concluded the Bank's decision not to apply the Involuntary Resettlement policy had had “dire consequences” for the affected population, many of whom had lost their life savings. It argued the situation could have been prevented with a “better approach” incorporating, inter alia, a social assessment.²⁸⁰ Bank President Robert Zoellick did respond strongly to the Panel's findings, issuing the following statement:

*From basic project management to interactions with the Board and Inspection Panel, the Bank's record with this project is appalling. We take very seriously the concerns raised by the Inspection Panel and we are moving promptly to strengthen oversight, improve procedures, and help families who had their buildings demolished. The Bank cannot let this happen again.*²⁸¹

The President also asked the Bank's Acting General Counsel to conduct an investigation and the Bank's Department of Institutional Integrity to lead an Accountability Review into alleged misrepresentations by staff to the Board, Panel and others. Following direct intervention from “the very top”, Management's response to the Panel's report fully acknowledged its serious errors.²⁸² It proposed an ‘action plan’ including legal aid and support for the complainants to seek compensation through the Albanian courts and, significantly, if that process proved

²⁷⁶ Ibid xv-xvi.

²⁷⁷ Ibid xiv-xv.

²⁷⁸ Ibid xviii-xx.

²⁷⁹ Ibid xxii.

²⁸⁰ Ibid xxvi-xxvii.

²⁸¹ World Bank (2009a).

²⁸² Inspection Panel (2009) 151.

unsatisfactory, to “reserv[e] the option” of directly compensating them. On this latter option it stressed, however, it was under no legal obligation to do so.²⁸³

Yet, two years later the complainants still have not been compensated for the loss of their homes. Management’s third progress report in 2011 indicates all cases are still bogged down in the courts.²⁸⁴ The report states the delays encountered are not “out of the ordinary” for Albania.²⁸⁵ Thus, the Bank does not yet appear ready to compensate those who lost their homes almost four years ago – at least in part because of its errors. Nor is it ready to admit any legal liability. And while President Zeollick promised to “strengthen oversight,” the Board did not request the Panel to oversee implementation of plans to remedy the harms.

In the more recent Cambodian case, the complaint was filed in 2009 by an NGO on behalf of a lakeside community comprising more than 4,000 families in Phnom Penh. About 1,500 families had already been forcibly evicted from the Boeung Kak Lake, while others were threatened with eviction to make way for a private urban development by a company owned by a ruling party senator.²⁸⁶ The complainants alleged these events were linked to the Bank-financed *Cambodia: Land Management and Administration Project* (‘*Cambodia Project*’), a key component of which was the issuing of land titles in 11 rural and urban areas.²⁸⁷

The area where the families lived was declared open for titling under the project in 2006. The families, however, claimed they were denied their rights to have their property claims considered as the area was later arbitrarily declared a “development zone” by the Government, a decision that went unchallenged by the Bank. Although one of the aims of the project was to reduce land conflicts, areas “likely to be disputed” and areas occupied by “informal settlers” were excluded from the titling system.²⁸⁸ These terms were not defined in the project documents - effectively providing a loophole for authorities to arbitrarily exclude areas from the titling process. Thus claimants alleged the project had not only denied them

²⁸³ World Bank (2009b) [55].

²⁸⁴ World Bank (2011a) 1.

²⁸⁵ Ibid.

²⁸⁶ Phnom Penh Post (2011).

²⁸⁷ *Cambodia Report* xiv.

²⁸⁸ Ibid [152], [155].

rights to gain formal land titles, but had undermined their pre-existing tenure rights based on customary or informal tenure regimes.²⁸⁹

The Panel essentially found the complaint fully justified, including a claim the Involuntary Resettlement policy should have been applied. It found the families, and others throughout Cambodia, were denied access to a due process of adjudication of their property claims as a result of critical design faults in the project, and a lack of Bank supervision over many years.²⁹⁰ Key parts of the project specifically designed to protect the poor and vulnerable were mostly overlooked including components to ensure legal protection for those at risk of eviction.²⁹¹ The Panel found Management had failed to act on information when the problems were first brought to its attention, only seriously engaging with the issue when rumours of a possible request to the Panel surfaced.²⁹² By that time, the situation had “already deteriorated beyond repair”.²⁹³ It essentially found lack of attention to the human rights context was at the core of Management’s failure to trigger the policy:

*Management’s attention to social consequences of land titling, including potential evictions, was not systematic ... It is a matter of concern that several supervision missions concluded that there had been no situation requiring application of the Social and Environmental Safeguards... apparently without any careful scrutiny of the matter.*²⁹⁴

In response, Management drafted an ‘action plan’, emphasising cooperation with the Government in addressing the harm caused to the families.²⁹⁵ Gaining Government co-operation on this, though, has been tough. In 2009 when the Bank first raised its concerns with the Government over the evictions, the latter cancelled financing for the project.²⁹⁶ Nonetheless, in this case, the Bank persisted; in August 2011 the Bank announced it would provide no further loans to Cambodia until the Government reached a satisfactory agreement

²⁸⁹ Centre on Housing Rights and Evictions, *Request for Inspection by World Bank Inspection Panel*, 4 September 2009 [7].

²⁹⁰ *Cambodia Report* xxvii.

²⁹¹ *Ibid* xxvii.

²⁹² *Ibid* xxii.

²⁹³ *Ibid* xxv.

²⁹⁴ *Ibid* xxiv.

²⁹⁵ *Ibid* xiii.

²⁹⁶ Phnom Penh Post (2011).

with the lakeside residents.²⁹⁷ A month later, it was reported the Prime Minister had agreed to award 12 hectares of the land to remaining families.²⁹⁸ It turned out later, though, not all remaining families were included in the plan and evictions, harassment and protests have continued.²⁹⁹

5.4 Lack of focus on rights' impacts

These two cases highlight, in a nutshell, the lack of attention by the Bank to potential social impacts – particularly rights abuses - in its projects. The Panel itself has identified this as a systemic problem in projects involving regulatory reform,³⁰⁰ but the problem is far broader as the Chad, Mumbai, West Africa and Pakistan cases, among others, highlight.

This, again, appears to reflect a narrow approach by the Bank in its seeming reluctance to fully analyse the social and political context of a project – including a rights assessment - which would enable it to more readily identify critical problems.³⁰¹ For example, in both the Cambodian and Albanian cases, the political landscape clearly pointed to the risk of forced eviction stemming from the reforms being undertaken as part of the projects. Indeed, in the Cambodian case the Panel in its report drew attention to the fact forced evictions had long been a well-documented human rights problem with some 150,000 Cambodians known to live at risk;³⁰² somewhat remarkably, the project design and those implementing it had not seriously addressed this problem.³⁰³

So in partnering with a government notorious for rights abuse,³⁰⁴ evictions in particular, it begs the question: how did those planning and implementing the project fail to adequately address this most glaring of issues? Arguably, only through a blinkered approach to potential harms related to its projects. Given the Bank's accountability mechanism has found it necessary in many cases to look at the broader picture – including the human rights situation -

²⁹⁷ Prak (2011).

²⁹⁸ Fawthrop (2011).

²⁹⁹ Chansy (2011); Zarifi (2011).

³⁰⁰ Inspection Panel (2009) 69.

³⁰¹ See eg. Herbertson, Thompson and Goodland (2010) 18.

³⁰² *Cambodia Report* xxvii.

³⁰³ *Ibid* xxviii.

³⁰⁴ See eg. Amnesty International (2008); Cambodian Human Rights Action Committee (2009); Grimsditch and Henderson (2009).

in understanding harms caused by projects, the Bank would be well advised to adopt a similar perspective if it is not to be repeatedly found wanting.

The need for broader perspectives and assessment was starkly highlighted in a recent case in the Congo where a Bank project promoting industrial logging failed in documents presented to the Board to even mention the indigenous pygmy population living in the forests and ignored the potential impact on the rural population of 40 million who largely depended on the forests for their subsistence.³⁰⁵

5.5 Supervision deficit

In all recent problem cases involving involuntary resettlement a lack of adequate supervision has been a core issue. In many cases the problem has arisen when the Bank has effectively delegated responsibility for key functions associated with resettlement. In the *West Africa Project* the Panel found the Bank had

*...put too much faith in the project sponsor's ability to handle complex social issues in spite of the troubled history of some of the participating companies' involvement in the Nigerian oil and gas sector.*³⁰⁶

Indeed, the Bank had not even conducted any training for the sponsor's staff on safeguard issues until after a complaint had been filed with the Panel.³⁰⁷ This had resulted in significant shortcomings, particularly in measures to avoid impoverishment.³⁰⁸

In the *Mumbai Project*, the Bank's failure to ensure adequate capacity of the implementing partner was also a major issue. As noted, the government agency responsible for the resettlement lacked trained staff; almost all responsibility for resettlement was then delegated to NGOs. The Panel found these lacked capacity and were ill-equipped to deal with "the overwhelming magnitude of the responsibilities transferred".³⁰⁹ In the *Pakistan Project*, the

³⁰⁵ Inspection Panel *Democratic Republic of Congo: Transitional Support for Income Recovery Grant Investigation Report* (2007) viii.

³⁰⁶ *West Africa Report* xxvi.

³⁰⁷ *Ibid* xxi.

³⁰⁸ *Ibid* xiv.

³⁰⁹ See *Mumbai Report* xxi.

Panel found Management's supervision seriously wanting for, inter alia, failing to consult with "down-stream affected people" for over half a decade, even though it was aware of the risk to their livelihoods, if not their lives, by serious technical problems with the project.³¹⁰

5.6 Lack of consultation

Lack of adequate consultation and information to affected people was a common theme throughout virtually all the recent resettlement cases. In some cases there was virtually no attempt at all to consult. In the *Mumbai Project*, Bank Management and the authorities maintained there were no alternative resettlement sites; effectively there was nothing to discuss. The 100,000-plus affected people were neither systematically informed nor consulted about their rights or options, and material available at special information centres was neither relevant nor in languages used by the affected populations.³¹¹

The communities affected by the *West Africa Project* were similarly deprived of relevant information. The Panel found no meaningful attempts were made to disclose information on the resettlement plan, including entitlements. Indeed, a translation of the document into a local language was not done until about two years after the last compensation payments had been made.³¹²

5.7 Conclusion on practice

These more recent Panel cases indicate the Bank still struggles in applying its Involuntary Resettlement Policy in the field; in the cases examined, its practice often falling well short of international standards. In some cases, what should have been the key goal – exploring all feasible options to avoid resettlement – appeared to get very little attention. This arguably stems from lack of emphasis in the policy itself, but it also suggests a lack of real understanding of the whole rationale of the policy among those required to apply it. The same could be said of the other critical anti-poverty goal – that of approaching any resettlement as a development project. Even the policy's "fallback" option of simply restoring incomes appeared to be a major challenge and the poor quality – or absence – of baseline studies in a

³¹⁰ *Pakistan Report* xxxvi.

³¹¹ *Mumbai Report* [350]-[353].

³¹² *West Africa Report* xix-xx.

number of the cases studied, made it impossible for the Bank to know either way whether it had achieved this goal. It's disturbing project staff in the *Mumbai Project* felt that they did not need to pay attention to income restoration despite uprooting tens of thousands of people. It's disturbing too so many adversely affected people in the cases examined were simply left off 'the radar screen' and that staff on the *Cambodia Project* could 'miss' critical risks that regularly were headline news.³¹³ This suggests a narrow economic focus that in spirit treats the policy as discretionary, rather than as binding guidelines; a focus that fails to seriously acknowledge the potentially devastating harms projects can generate.

Caution needs to be exercised in trying to apply these findings to the Bank's *overall* practice on involuntary resettlement as these cases, as noted, are only those that came under the Panel's spotlight. To make any definitive conclusions regarding the Bank's practice more generally, study of all recent projects involving involuntary resettlement – not only those that came to the Panel's attention - would need to be undertaken. However, as the Panel has highlighted the Bank has done very little to publicise the Panel's existence among those who may be affected by its projects, and it is unlikely these are the *only* problem cases. Further the Panel, drawing on its 17 years of experience, has itself identified many of the problems evident in these cases as "systematic issues".³¹⁴ Indeed, in its latest Annual Report the Panel notes an apparent lack of "due diligence" being paid to the safeguard policies as a result, inter alia, of the Bank's incentive structure to 'move the money', and the Panel highlights the pressing need for "more systemic assessment of operational risks and risks of a political economy nature".³¹⁵ Certainly the findings point to the need for the Bank to undertake a comprehensive review of all its projects involving involuntary resettlement from the past decade to fully identify the extent of - and to understand - the problems highlighted in the Panel cases.

³¹³ See eg. De Launey (2006) & (2008).

³¹⁴ See *Annual Report 2011*, 11-12.

³¹⁵ Ibid 12.

6 Conclusion

In crucial ways, the Bank's Involuntary Resettlement policy, its complaints mechanism and field practice regarding resettlement (as evidenced in the cases studied) would appear to fall short of the requirements of international human rights law. The Bank deserves credit for taking the lead in developing an Involuntary Resettlement policy that provides many important protections. However, as discussed, the policy has a number of weaknesses that undoubtedly have led to poor outcomes in the field. The creation of the Inspection Panel too was an important, if somewhat forced, acknowledgement by the Bank that its responsibilities to avoid harm should be matched by accountability. The Panel has operated to shine a critical light on the Bank's practice and has demonstrated it is willing and able in a range of circumstances to assess that practice by human rights standards. Indeed, it has indicated that the Bank needs to adopt a far broader and more systematic approach to enable it to guard against harm and meet those standards. However, the Panel cannot be seen as an effective accountability mechanism, with crucial decision-making power lying with the Board, a political body that has demonstrated it's not committed to providing effective remedies and will only tolerate limited scrutiny.³¹⁶ It's perhaps not surprising then the Bank's field practice, in many of the cases examined, did not meet basic safeguards. The Panel did find evidence of good practice, but in the cases studied too often the needs of those adversely affected were not taken seriously until requests were made to the Panel.

As noted, the question of whether the Bank's policy and field practice meet international human rights standards is not an academic one, given the potentially devastating consequences. It's contended, however, that it is not simply a matter the Bank needs to address as a 'good international citizen'. Rather, the Bank has *legal* obligations under international law to address the shortcomings in its policy, complaint mechanism and practice. That is, it must revise its Involuntary Resettlement policy and restructure its complaint

³¹⁶ Cf. *Ruggie Guidelines*, [28]-[31].

mechanism to bring them into line with international rights standards. For the latter this would mean *inter alia* ensuring that those harmed have access to effective remedies.

What does it mean for the Bank in its field practice? This is indeed a complex question that could only be touched on in this paper. In short, though, at the least the Bank must exercise vigilance to ensure it does not contribute to human rights violations when involved with involuntary resettlement. Certainly, as mentioned, the Bank firstly needs to understand the extent of the problems identified in the Panel cases and thus needs to conduct a comprehensive analysis of the human rights impacts of *all* its recent projects involving resettlement. More generally, for each project due diligence would require, *inter alia*, comprehensive human rights impact assessments before, during and after its projects, with the findings incorporated into each stage of the development.³¹⁷ Only through such assessments and procedural checks would the Bank be in a position to systematically assess risks and monitor impacts – and, where necessary, act to ensure no loss of enjoyment of rights from the pre-project level with the core level of right as an absolute minimum.

It is contended these are *legal* obligations but, in any event, the recent Panel cases suggest many critical problems could be avoided with a more direct focus on rights at critical stages of the project. The cases involving Cambodia, Albania, Ghana, Nigeria, Congo, India and Pakistan are obvious examples. Effectively such an approach helps shift the focus of analysis to the most deprived and excluded,³¹⁸ with clear benefits for all parties. In the early stages, for example, it would help clearly define the *true* costs of a project and help ensure that *all* affected people were taken into account. While many within the Bank have studiously resisted using the ‘language of rights’ and facing squarely the question of its own legal obligations, it is apparent a more rights-oriented focus would indeed help the Bank comply with its policy and achieve its aim of sustainable development.³¹⁹ More importantly, however, injecting human rights perspectives into the plans, policies and processes of the Bank could make a crucial difference to the lives and livelihoods of those millions literally driven from their homes each year in the name of development.

³¹⁷ *Ruggie Guidelines* [17]-[24] ; Herbertson, Thompson and Goodland (2010) 18.

³¹⁸ Alston and Robinson (2005) 38.

³¹⁹ See *ibid* 37-41.

An afterword

In Phnom Penh neighbours of those forcibly evicted under the *Cambodia Project* continue to fight for their homes - and in some cases, their lives - around the fast disappearing Boeung Kak Lake. On 16 September 2011, excavators demolished the homes of eight more families who have tried to stand their ground in fighting eviction. One protester was beaten unconscious amid a clash between residents and about 100 riot police and security guards who had arrived at the site without warning.³²⁰ Amnesty International says some of the residents were able to retrieve their belonging, others lost everything.³²¹ Despite the sand pumped in by the company to fill the lake all around them, resident Heng Mom, is still hoping to stay: “We have raised money to rebuild our houses, but we cannot do it because the sand is [causing] flooding [on the land] ... they are behaving very cruelly.”³²² Unlike those evicted in the *Albania Project*, the World Bank has not indicated that, if necessary, it is willing to directly assist those evicted in Cambodia despite its contribution to the debacle.

³²⁰ Amnesty International (2011); Zarifi (2011).

³²¹ Zarifi (2011)

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8

Annex A

List of cases reported on, or received, by the Inspection Panel from January 2005 to October 2011 where involuntary resettlement was raised in the Request for Inspection.

1. India: Mumbai Urban Transport Project

Requests received: 28 April 2004/29 June 2004.

Status: Full investigation and Board request for one progress report.

Investigation Report: 21 December 2005 (Report No. 34725).

Progress Report: 5 June 2007 (Report No. 39944).

2. Pakistan: National Drainage Program Project

Request received: 10 September 2004.

Status: Full investigation.

Investigation Report: 6 July 2006 (Report No. 36382-PK).

3. Democratic Republic of Congo: Transitional Support for Economic Recovery Credit Operation (TSERO) and Emergency Economic and Social Reunification Support Project (EESRSP)

Request received: 19 November 2005.

Status: Full investigation, but Involuntary Resettlement policy not discussed in investigation; assessed in light of other policies including Indigenous People policy.

Investigation Report: 31 August 2007 (Report No. 40746).

4. Nigeria: West African Gas Pipeline Project

Request received: 27 April 2006.

Status: Full investigation.

Investigation Report: 25 April 2008 (Report No. 42644-GH).

5. Uganda: Private Power Generation (Bujagali) Project

Request received: 5 March 2007.

Status: Full investigation.

Investigation Report: 29 August 2008 (Report No. 44977-UG).

6. Albania: Power Sector Generation and Restructuring Project

Request received: 30 April 2007.

Status: Full investigation but involuntary resettlement was not included in the scope of the investigation as not considered relevant.

Investigation Report: 7 August 2009 (Report No. 49504-AL).

7. Albania: Integrated Coastal Zone Management and Clean-up Project

Request received: 30 April 2007.

Status: Full investigation.

Investigation Report: 24 November 2008 (Report No. 46596-AL).

8. Ghana: Second Urban Environmental Sanitation Project

Request received: 16 August 2007.

Status: Full investigation.

Investigation Report: 13 March 2009 (Report No. 47713-GH).

9. Cameroon: Urban Development Project and Second Urban Project

Request received: 5 September 2007.

Status: Request not registered; ruled ineligible as more than 95 percent of project funds disbursed.

Notice of Receipt of a Request for Inspection and Decision Not to Register: 5 September 2007.

10. Argentina: Santa Fe Infrastructure Project and Provincial Road Infrastructure Project

Request received: 13 September 2007.

Status: Full investigation, but matters involving involuntary resettlement largely resolved during early problem solving and not subject of full investigation.

Investigation Report: 2 July 2009 (Report No. 49110-AR).

11. Colombia: Bogota Urban Services Project

Request received: 30 October 2007.

Status: Request not registered; ruled ineligible as failed to satisfy procedural criterion that Requesters had brought the matter to attention of Bank management.

Report and Recommendation on Request for Inspection: 7 January 2008 (Report No. not available).

12. India: Mumbai Urban Transport Project (5th request)

Request received: 29 May 2009

Status: No investigation as matter resolved to satisfaction of requesters during early problem solving.

Report and Recommendation on Request for Inspection: 7 August 2009 (Report No. 49873).

13. Cambodia: Land Management and Administration Project

Request received: 4 September 2009.

Status: Full investigation.

Investigation Report: 23 November 2010 (Report No.58016-KH).

14. South Africa: Eskom Investment Support Project

Request received: 6 April 2010.

Status: Full investigation: investigation ongoing.

Report and Recommendation on Request for Inspection: 28 June 2010 (Report No.55231-2A).

Comment: Full Board discussion on Panel recommendation.

15. Kazakhstan: South-west roads: Western Europe-Western China International Transit Corridor

Request received: 24 April 2010.

Status: No investigation as matter resolved to satisfaction of requesters during early problem solving.

Report and Recommendation on Request for Inspection: 28 June 2010 (Report No. 55259-KZ).

16. Chile: Quilleco Hydropower Project

Request received: 26 May 2010.

Status: Investigation not recommended as issues raised were found not to relate to World Bank funded project.

Report and Recommendation on Request for Inspection: 23 August 2010 (Report No. 56225 - CL).

17. Tajikistan: Energy Loss Reduction Project (Rogun HPP, Tajikistan)

Request received: 8 October 2010.

Status: Investigation not recommended as Panel can only investigate matters related to Bank-financed activities and the Bank was only financing the Assessment Studies for a restructured hydropower plant; most issues raised by the request related to the hydropower plant, rather than the study.

Report and Recommendation on Request for Inspection: 23 December 2010 (Report No. 58541 - TJ).

Comment: Board discussion on Panel's recommendation.

18. Lebanon: Greater Beirut Water Supply Project

Request received: 2 November 2010.

Status: Investigation recommended by Panel on issues not involving Involuntary Resettlement policy. Board requested full discussion on Panel's recommendation and later "invited" Panel to await decision of a Management-commissioned study before making final recommendation on investigation. Panel subsequently reported it would await further developments and report to Board in early 2013.

Report and Recommendation on Request for Inspection: 20 January 2011 (Report No. 59101-LB).

Follow-up Report to Board Decision of 10 March 2011: 29 July 2011 (Report No. 63546-LB).

Comment: Full Board discussion on Panel recommendation.

19. Kazakhstan: South-West Roads: Western Europe-Western China International Transit Corridor

Request received: 15 June 2011.

Status: No investigation recommended as requesters satisfied that their concerns had been resolved or were about to be resolved.

Report and Recommendation on Request for Inspection: 18 October 2011 (Report No. 64964-KZ).